

SUBCHAPTER K—REGULATIONS UNDER PUBLIC LAW 91-469

PART 390—CAPITAL CONSTRUCTION FUND

- Sec.
- 390.1 Scope of the regulations.
- 390.2 Application for an agreement.
- 390.3 Policy considerations.
- 390.4 Description of the agreement.
- 390.5 Agreement vessels.
- 390.6 Administration of the agreement.
- 390.7 Deposits into the fund.
- 390.8 Investment of the fund.
- 390.9 Qualified withdrawals.
- 390.10 Nonqualified withdrawals.
- 390.11 Sale or other disposition of agreement vessels.
- 390.12 Liquidated damages.
- 390.13 Failure to fulfill a substantial obligation under the agreement.
- 390.14 Departmental reports and certification.
- APPENDIX I TO PART 390—U.S. DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION—APPLICATION INSTRUCTIONS
- APPENDIX II TO PART 390—SAMPLE CAPITAL CONSTRUCTION FUND AGREEMENT
- APPENDIX III TO PART 390—U.S. DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION—SAMPLE SEMIANNUAL REPORT
- APPENDIX IV TO PART 390—SAMPLE ADDENDUM TO MARITIME ADMINISTRATION CAPITAL CONSTRUCTION FUND AGREEMENT
- APPENDIX V TO PART 390—SAMPLE QUALIFIED TRADE AFFIDAVIT

AUTHORITY: Secs. 53501, *et seq.*, of Title 46, United States Code, formerly, sec. 607, Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1177); 49 CFR 1.66.

SOURCE: 41 FR 4265, Jan. 29, 1976, unless otherwise noted.

§ 390.1 Scope of the regulations.

(a) *In general*—(1) *Scope*. The regulations prescribed in this part govern the capital construction fund (“fund”) authorized by 46 U.S.C. 53501 *et seq.*

(2) *Establishment of a fund*. A fund is established by an agreement (“agreement”), which is a contract between the party (“party”) and the United States.

(3) *Purpose of the fund*. Chapter 535 provides that any agreement entered into with the Secretary of Transportation must be for the purpose of providing replacement vessels, additional vessels or reconstructed vessels to be built and documented in the United States and operated in the United

States foreign, Great Lakes or non-contiguous domestic trade.

(4) *Benefits of a fund*. Chapter 535 provides for the nontaxability of certain deposits of money or other property placed into a fund established pursuant to an agreement within certain ceilings. These ceilings are equal to:

(i) Earnings or gains realized from the operation of an agreement vessel;

(ii) Net proceeds realized from the sale or other disposition of an agreement vessel or from insurance or indemnification from the loss of an agreement vessel; and

(iii) Earnings from the investment or reinvestment of amounts on deposit in the fund.

(5) *Delegation*. The Secretary of Transportation has delegated the authority for matters relating to the United States Merchant Marine to the Maritime Administrator, Department of Transportation (“Maritime Administrator”).

(b) *Act*. For purposes of this part, the term Act shall mean Chapter 535 of Title 46, United States Code.

(c) *Joint regulations*. For purposes of this part, the term *joint regulations* shall mean the regulations prescribed by the Secretary of Transportation and the Secretary of the Treasury under Chapter 535 and published in title 26, part 3 of the Code of Federal Regulations (reprinted in part 391 of this chapter).

(d) *Cross references*. For rules relating to the Federal Income Tax aspects of a fund, see the joint regulations. For rules governing agreements relating to the fisheries of the United States, see the separate Secretary of Commerce regulations published in title 50, part 259 of the Code of Federal Regulations.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.2 Application for an agreement.

(a) *In general*—(1) *Application instructions*. The Maritime Administrator has adopted instructions for making application for an agreement. These instructions are contained in appendix I to

§ 390.3

this part. MARAD will accept electronic options (such as facsimile and Internet) for transmission of required information to MARAD, if practicable.

(2) *General eligibility requirements.* Chapter 535 specifies who is eligible for a fund and the application instructions specify what information is required to establish such eligibility. An applicant must:

(i) Be a citizen of the United States within the meaning of 46 U.S.C. 50501, as amended (46 U.S.C. 802, 803). See part 355 of this title for requirements for establishing United States citizenship;

(ii) Own or be the lessee of one or more eligible vessels or share thereof as defined in 46 U.S.C. 53501, or be party to a contract for the construction of one or more eligible vessels, or share thereof, as defined in paragraph (b) of § 390.5;

(iii) Have a program which furthers the purposes of the Act (see § 390.3 relating to policy considerations) and provides for the acquisition, construction or reconstruction of a qualified vessel, as defined in 46 U.S.C. 53501(5). Such provisions state that the vessel will be operated in the United States foreign, Great Lakes, noncontiguous domestic, or short sea transportation trade as defined in 46 U.S.C. 53501 and 46 U.S.C. 109(b); and

(iv) Demonstrate the financial capabilities to accomplish the program.

(b) *Information which may be required in conjunction with the application.* An applicant must provide such facts, documents and materials as the Maritime Administrator may require in considering whether to enter into an agreement. An applicant should be ready to make available such applicable materials, including, but not limited to: Design plans, data concerning the reasonableness of the cost of the program, construction contracts, financial statements, certificates of incorporation, bylaws, articles of partnership, stock ownership data and other information including judgments and pending litigation which would affect the proposed

46 CFR Ch. II (10–1–15 Edition)

program. The specific information required is set forth in the instructions.

(Approved by the Office of Management and Budget under control number 2133–0027)

[41 FR 4265, Jan. 29, 1976, as amended at 47 FR 25530, June 14, 1982; 68 FR 62539, Nov. 5, 2003; 69 FR 61452, Oct. 19, 2004; 73 FR 56740, Sept. 30, 2008]

§ 390.3 Policy considerations.

(a) *In general.* It is the policy of the United States, as set forth in 46 U.S.C. 50501, that for the national defense and the development of its foreign and domestic commerce, the United States shall have a merchant marine: sufficient to carry a substantial portion of its water-borne export and import foreign commerce and to provide shipping service essential for maintaining the flow of such commerce at all times; capable of serving as auxiliaries in time of war or national emergency; owned and operated by United States citizens insofar as practicable and composed of the best equipped, safest and most suitable types of vessels, constructed and documented in the United States and manned with United States citizens.

(b) *Unacceptable programs*—(1) *In general.* The Maritime Administrator will not enter into an agreement where the proposed program is not, in his opinion, in consonance with the policies of the Act.

(2) *Specific unacceptable programs.* The Maritime Administrator will not enter into an agreement where the proposed program is merely to accomplish the following:

(i) Reconstruction of an existing vessel, unless such reconstruction will exceed \$1,000,000 in cost, will be capitalized under the Internal Revenue Code of 1986, as amended, and the regulations thereunder and will result in a vessel which is significantly more competitive;

(ii) Acquisition of an existing vessel; or

(iii) Payment of the principal on existing indebtedness.

(3) *Waiver.* The Maritime Administrator may, for good cause shown, waive the provisions of paragraph (b)(2) of this section. For example, the Maritime Administrator may waive the monetary limit in paragraph (b)(2)(i) of

this section where the applicant proposes to reconstruct a small vessel.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.4 Description of the agreement.

(a) *In general.* The agreement consists of a standard part and appended schedules. The standard part of the agreement contains recitals, covenants and warranties which apply to all parties. The appended schedules set forth the particular program of the party and contain other information unique to each agreement. See § 390.6 (relating to administration of the agreement) for procedures and criteria for the modification of schedules.

(b) *Schedule A—Eligible agreement vessels.* Schedule A lists the names of eligible agreement vessels (as defined in § 390.5), whether owned or leased, and the allowable percentage of the depreciation ceiling, if any, available for deposit purposes by the party. See § 390.7 (relating to deposits) for allowable depreciation in the case of leased vessels.

(c) *Schedule B—Program—(1) In general.* Schedule B sets forth the program of the party including the cost of the program and the time in which the program shall be accomplished.

(2) *Items in Schedule B.* Schedule B shall contain:

(i) A statement describing each qualified agreement vessel (as defined in § 390.5) to be acquired, constructed or reconstructed. In the case of reconstruction, the statement will include a general description of the work to be performed;

(ii) The anticipated date on which the acquisition, construction or reconstruction of each qualified agreement vessel will commence;

(iii) The anticipated total cost, including any costs which will not be paid from the fund, of the acquisition, construction or reconstruction of each qualified agreement vessel; and

(iv) The amount to be withdrawn from the fund with respect to the acquisition, construction or reconstruction of each qualified agreement vessel.

(3) *Submission of contracts.* When a contract is executed for any acquisition, construction or reconstruction relating to the agreement, such contract shall be submitted within 30 days after

execution to the Maritime Administrator who shall then determine whether such undertaking is in accordance with the program set forth in Schedule B.

(d) *Schedule C—Depositories.* Schedule C lists, by name and address, the depositories of the fund. See § 390.7 (relating to deposits).

(e) *Schedule D—Minimum deposits.* Schedule D sets forth the minimum deposits which must be made into the fund. See § 390.7 (relating to deposits) for the procedure in setting minimum deposits.

(f) *Submission of proposed schedules.* An applicant shall submit proposed schedules with his application. The specific information required in such schedules is set forth in the application instructions referred to in paragraph (a)(1) of § 390.2. A sample agreement (standard part and appended schedules) is contained in appendix II to this part.

§ 390.5 Agreement vessels.

(a) *In general.* 46 U.S.C. 53501 states the requirements for eligible, qualified and agreement vessels. The rules in this section further define such terms and state how vessels must be listed on Schedules A and B in the agreement.

(b) *Eligible agreement vessels—(1) Definition.* An eligible agreement vessel, which may be used to establish ceilings for deposit purposes, is any vessel:

(i) Constructed in the United States, and if reconstructed, reconstructed in the United States; the term *constructed or reconstructed in the United States* includes any vessel which was constructed or reconstructed outside of the United States but documented under the laws of the United States on April 15, 1970, or constructed or reconstructed outside of the United States for use in the United States foreign commerce pursuant to a contract entered into before April 15, 1970;

(ii) Documented under the laws of the United States;

(iii) Operated in the foreign or domestic commerce of the United States;

(iv) Engaged primarily in the waterborne carriage of men, materials, goods or wares; and

(v) Designated in the agreement as an "eligible agreement vessel."

(2) *Scope of the term “eligible agreement vessel.”* For purposes of generating ceilings for deposits under 46 U.S.C. 53505 and the joint regulations the term *eligible agreement vessel* includes any:

- (i) Tug or barge;
- (ii) Vessels which have been contracted for or are in the process of construction; and
- (iii) Share interest in a vessel; the party is considered to have a share interest in an eligible agreement vessel if the party has the right to use the vessel to generate income or a right to the proceeds or a portion of the proceeds from its use even if the party does not have a proprietary interest in the vessel for purposes of State or Federal law.

(3) *Foreign or domestic commerce.* For the purpose of paragraph (b)(1)(iii) of this section the term *foreign or domestic commerce* means the water-borne carriage of men, materials, goods or wares between:

- (i) Two points in the United States;
- (ii) A point in the United States and a point in a foreign country; or
- (iii) Two points in the same foreign country or points in two different foreign countries.

(c) *Qualified agreement vessels—(1) Definition.* A qualified agreement vessel which may be acquired, constructed or reconstructed with the aid of qualified withdrawals, is any vessel:

- (i) Constructed in the United States, and if reconstructed, reconstructed in the United States; the term *constructed or reconstructed in the United States* includes any vessel which was constructed or reconstructed outside of the United States but documented under the laws of the United States on April 15, 1970, or constructed or reconstructed outside of the United States for use in the United States foreign commerce pursuant to a contract entered into before April 15, 1970;
- (ii) Documented under the laws of the United States;
- (iii) Operated in the United States foreign, Great Lakes, noncontiguous domestic, or short sea transportation trade.
- (iv) Engaged primarily in the water-borne carriage of men, materials, goods or wares; and

(v) Designated in the agreement as a “qualified agreement vessel.”

(2) *Scope of the term “qualified agreement vessel.”* For purposes of making qualified withdrawals under 46 U.S.C. 53509 and the joint regulations the term *qualified agreement vessel* includes any:

- (i) Cargo handling equipment which the Maritime Administrator determines will be used primarily on a qualified agreement vessel. Normally any auxiliary equipment which is ordinarily carried from port to port, excluding equipment that needs frequent replacement due to normal wear and tear, and is used in conjunction with the loading or unloading of the vessel is deemed to be cargo handling equipment;

(ii) Ocean-going towing vessel or barge which the Maritime Administrator determines is suitable for the trade in which the party intends to operate such vessel or barge, or any comparable vessel or barge operated on the Great Lakes which is suitable for its intended trade; and

(iii) Proprietary interest in a qualified agreement vessel as, for example, that which may result from a joint venture or partnership.

(3) *Foreign trade.* Foreign trade shall mean the water-borne carriage of men, materials, goods or wares between:

- (i) A point in the United States and a point in a foreign country;
- (ii) Two points in the domestic trade permitted under the first sentence of 46 U.S.C. 53101 note; or

(iii) Two points in the same foreign country or points in two different foreign countries in the case of liquid and dry bulk cargo carrying services provided the party demonstrates that such operating flexibility is needed to compete with foreign flag vessels in its operations or in competing for charters.

(4) *Great Lakes trade.* Great Lakes trade shall mean the waterborne carriage of men, materials, goods or wares between points on the Great Lakes and their connecting and tributary waterways in the immediate environs of the Great Lakes.

(5) *Noncontiguous domestic trade.* Noncontiguous domestic trade shall mean the water-borne carriage of men, materials, goods or wares between:

(i) The contiguous 48 States on the one hand and Alaska, Hawaii, Puerto Rico and the insular territories and possessions of the United States on the other hand; and

(ii) Any point in Alaska, Hawaii, Puerto Rico and the insular territories and possessions of the United States, and any other point in Alaska, Hawaii, Puerto Rico and such territories and possessions.

(6) Short Sea Transportation Trade. The term short sea transportation trade means the carriage by vessel of cargo—

(i) That is:

(A) Contained in intermodal cargo containers and loaded by crane on the vessel; or

(B) Loaded on the vessel by means of wheeled technology; and

(ii) That is:

(A) Loaded at a port in the United States and unloaded either at another port in the United States or at a port in Canada located in the Great Lakes Saint Lawrence Seaway System; or

(B) Loaded at a port in Canada located in the Great Lakes Saint Lawrence Seaway System and unloaded at a port in the United States.”

(7) *Nonqualified operations.* Nonqualified operations for qualified agreement vessels include:

(i) Positioning vessels in support of domestic operations prohibited by Chapter 535;

(ii) Use of barges as docks and ramps;

(iii) Except as provided in (c)(8) (i) and (ii) of this section:

(A) Foreign-to-foreign trade, consisting of voyages originating and ending in foreign ports, with no intermediate domestic cargo operation, and

(B) Trade from foreign ports to and from U.S. oil rigs in international waters; and

(iv) Bunkering in support of nonqualified trade operations.

(8) *Permissible operations.* Permissible operations for qualified agreement vessels include:

(i) Foreign-to-foreign trade in the case of vessels operating as part of U.S.-flag service and carrying cargo originating in or destined for U.S. ports, i.e., U.S.-flag feeder vessels;

(ii) Foreign-to-foreign trade, including the lightering of foreign-flag ves-

sels, in the case of vessels carrying liquid or dry bulk cargoes when the carrier has demonstrated to the Administrator:

(A) The need for such foreign-to-foreign shipments (as required by 46 U.S.C. 109 and paragraph (c)(iii) of this section), and

(B) That the proposed cargo would qualify as liquid or dry bulk cargo;

(iii) Ship assist work, including lightering or shifting of a vessel at the end or beginning of a noncontiguous domestic, short sea transportation trade, Great Lakes or U.S. foreign trade voyage. In addition, the lightering of foreign-flag vessels in U.S. ports is permitted.

(9) *United States construction.* An agreement vessel is considered to be of United States construction if:

(i) It is built entirely in a shipyard or shipyards within any of the United States and the Commonwealth of Puerto Rico;

(ii) All components of the hull and superstructure are fabricated in the United States; and

(iii) The vessel is assembled entirely in the United States.

(d) *Agreement vessels—(1) Definition.* The term *agreement vessel* means any eligible or qualified vessel which is subject to an agreement.

(2) *Scope of the term “agreement vessel.”* For purposes of generating ceilings and making qualified withdrawals the term *agreement vessel* includes containers, trailers or barges which are part of the complement of an agreement vessel. The complement is limited to three times the container, trailer or barge capacity of the vessel, unless the Maritime Administrator shall agree to a different complement.

[41 FR 4265, Jan. 29, 1976, as amended at 55 FR 34928, Aug. 27, 1990; 73 FR 56740, Sept. 30, 2008; 74 FR 17097, Apr. 14, 2009]

§ 390.6 Administration of the agreement.

(a) *In general.* The Maritime Administrator will administer and enforce the agreement in a manner which will insure that the fund is properly established, that the assets in the fund are used to accomplish the program and that the party fully complies with all obligations and responsibilities. This

section specifies the reports which must be submitted to the Maritime Administrator and sets forth the procedures for administering the agreement.

(b) *Reporting requirements*—(1) *In general*. This paragraph describes the reports required to be submitted to the Maritime Administrator by the party.

(2) *Submission dates*. Reports must be submitted annually, in triplicate, for the party's taxable year not later than 90 days after the close of each reporting period. An affidavit regarding the operation of qualified agreement vessels as required by paragraph (b)(7) of this section shall be submitted concurrently with each annual report.

(3) *Cumulation*. The annual report submitted following the close of the party's taxable year shall be cumulative for the party's entire taxable year.

(4) *Certification*. The annual report shall be accompanied by an opinion of an independent certified public accountant to the effect that exhibits (see paragraph (b)(5) of this section) composing the accounting have been prepared in accordance with all published orders, rules, regulations and instructions issued or adopted by the Maritime Administrator.

(5) *Format*. The reports shall consist of the following exhibits:

(i) "Exhibit A"—a summary of cash, securities and stock on deposit (showing the adjusted basis for securities and stock), including a subtotal of cash, securities and stock on deposit, net amount of accrued deposits to and accrued withdrawals from the fund and the fund total at the end of the period, and if applicable, a summary of the portion of the fund which represents a "CCF: Security Amount" pursuant to an Agreement Covering the Dual Use of a Capital Construction Fund;

(ii) "Exhibit A-1"—a summary of balances in all cash accounts within the fund at the end of the period;

(iii) "Exhibit A-2"—a summary of the securities and stock within the fund at the end of the period (showing both the adjusted basis and fair market value of each item);

(iv) "Exhibit A-3"—a summary of the accrued deposits to and accrued withdrawals from the fund at the end of the period;

(v) "Exhibit B"—a transcript of transactions occurring within the fund during the period by date;

(vi) "Exhibit C"—a summary showing the opening balance, additions thereto due to deposits to the fund, subtractions therefrom due to withdrawals from the fund, and the closing balance for the period for each of the three separate accounts: ordinary income account, capital gains account and capital account; and

(vii) "Exhibit D"—a summary, by vessel, of the qualified withdrawals made from the fund during the period.

(6) *Sample report*. A sample report is contained in appendix III of this part.

(7) *Affidavit*. An official of the party who is knowledgeable about the operation of the party's qualified agreement vessels shall submit an affidavit for each taxable year indicating that the party's qualified agreement vessels operated only in qualified trades during such taxable year, or if any such vessel operated in a trade other than a qualified trade, the details of such operation. See § 390.5(c) of this part for a description of what constitutes a qualified trade. A sample affidavit is contained in appendix V of this part.

(8) *Failure to submit reports*. The failure by a party to make the timely submission of any report or affidavit required by this section shall constitute a material breach of the agreement unless the Maritime Administrator shall determine that such failure was excusable. See § 390.13 (relating to the failure to fulfill a substantial obligation under the agreement).

(c) *Review in the event of changed circumstances*. Each agreement provides that the party shall promptly inform the Maritime Administrator of any change in circumstances which affects its agreement. Such changes may be mere form, such as a change of the party's name, or substantive such as the sale of an eligible agreement vessel. The Maritime Administrator may require a full review of the agreement if in his opinion the changed circumstances materially affect the agreement.

(d) *Modification of agreement*—(1) *In general*. The agreement is subject to

modification and amendment by mutual consent. However, except in special circumstances, the Maritime Administrator will not consent to modification or amendment of the standard part of the agreement unless such modification or amendment is of uniform application to similarly situated parties. The Maritime Administrator will normally agree to modification or amendment of the schedules subject to the restriction in paragraph (d)(2) of this section.

(2) *Limitations on modification of schedules.* The Maritime Administrator will not agree to modification or amendment of the schedules (as described in §390.4) when, in his opinion, such modification or amendment delays imposition of Federal Income Tax in a manner not contemplated or authorized by the Act, or if the proposed modification or amendment would not be in consonance with the policies of the Act, these rules and regulations or the joint regulations.

(e) *Fund adjustment upon modification.* Upon application by a party for modification or amendment of the agreement, the Maritime Administrator will determine whether the requested modification or amendment would result in an amount held in the fund in excess of an amount determined to be necessary or appropriate to carry out the program. If such an excess is created in the fund by such modification or amendment, the Maritime Administrator will require a nonqualified withdrawal (as defined in §390.10) of such excess as a condition to the modification or amendment.

[41 FR 4265, Jan. 29, 1976, as amended at 41 FR 39751, Sept. 16, 1976; 55 FR 34928, Aug. 27, 1990]

§ 390.7 Deposits into the fund.

(a) *In general*—(1) *Source of deposits.* 46 U.S.C. 53505 provides ceilings within which fund deposits may be made. This section provides rules for the qualification of depositories, timing of deposits, the type of property which may be deposited and the level of deposits.

(2) *Tax aspects of deposits.* For the Federal Income Tax aspects of deposits into a fund, see 46 U.S.C. 53507 and §3.3 of the joint regulations (§391.3 of this chapter).

(b) *Depositories*—(1) *In general.* 46 U.S.C. 53506 provides that amounts in a fund must be kept in the depository or depositories specified in the agreement and be subject to such trustee or other fiduciary requirements as the Maritime Administrator may specify.

(2) *Qualifications.* The Maritime Administrator has established general qualifications for depositories for all maritime programs authorized under the Act, including the capital construction fund program. The general qualifications are published in Part 351 of this title.

(3) *Fiduciary requirements.* Except in unusual circumstances, the Maritime Administrator will not impose special trustee or other fiduciary requirements upon depositories of a fund. For rules relating to a fund held in trust for investment purposes, see paragraph (h) of this section.

(4) *Type and name of accounts.* Unless otherwise specified in the agreement, the party may select the type or types of accounts in which assets of the fund may be deposited. For example, the party may select a savings account for cash and a trust account for intangible property which is held in the fund. Each account shall be in the name of the party and identified as a capital construction fund account.

(5) *Compensating balances.* The obligation of the assets in the fund as a compensating balance shall constitute a material breach of the agreement.

(c) *Timing of deposits*—(1) *In general.* 46 U.S.C. 53507(b) provides that deposits shall not be taxable only when they are made in accordance with the agreement and not later than the time provided in the joint regulations.

(2) *Deposits prior to the time provided in joint regulations.* The party may make deposits for any taxable year prior to the time provided in joint regulations in accordance with the following rules:

(i) Amounts representing taxable income attributable to the operation of agreement vessels for a taxable year may be deposited at any time during such taxable year, and thereafter within the time provided for in the joint regulations, based upon the party's estimated Federal taxable income for such vessels for the entire taxable year;

(ii) Amounts representing net proceeds from the sale or other disposition (including mortgaging) with respect to agreement vessels may be deposited when accrued and thereafter within the time provided for in the joint regulations;

(iii) Amounts representing receipts from the investment or reinvestment of amounts held in a fund may be deposited when accrued and thereafter within the time provided for in the joint regulations; and

(iv) Amounts representing depreciation with respect to agreement vessels for a taxable year may be deposited at any time during such taxable year, and thereafter within the time provided for in the joint regulations.

(3) *Deposits required prior to the time provided in joint regulations.* The Maritime Administrator may require that deposits be made earlier than the latest time provided for in the joint regulations. Generally, the Maritime Administrator will require early deposits only when necessary for the party to meet its agreed upon obligations.

(d) *Types of property which may be deposited into a fund—*(1) *Form of deposits.* Deposits may be made into a fund only in the form of money or intangible property of the type in which assets of the fund may be invested pursuant to 46 U.S.C. 53506, the Agreement, and these regulations, other than the securities or common and preferred stock of the party or a company related to the party within the meaning of paragraph (d)(2) of this section, except that in the case of deposits representing net proceeds from the sale or other disposition of any agreement vessel to other than a purchaser or transferee related to the party (within the meaning of paragraph (d)(2) of this section) or deposits representing receipts from the investment or reinvestment of amounts held in a fund, any intangible property received may be deposited.

(2) *Related purchaser.* For purposes of this paragraph a purchaser or transferee is a related person to the party if—

(i) The relationship between purchaser or transferee and the party would result in disallowance of losses under section 267 or 707 of the Code, or

(ii) The purchaser or transferee and the party are members of the same controlled group of corporations (as defined in section 1563(a) of the Code, except that “more than 50 percent” shall be substituted for “at least 80 percent” each place it appears therein).

(e) *Level of deposits—*(1) *In general.* 46 U.S.C. 53504 states that the agreement must provide for the deposit in the fund of amounts agreed upon but only to the extent necessary or appropriate to provide for qualified withdrawals to accomplish the program set forth in the agreement.

(2) *Maximum level of deposits.* The party shall not be permitted to deposit more than is necessary to complete its program. See § 390.4 (relating to description of the agreement).

(3) *Minimum level of deposits.* Each agreement shall contain an agreed upon minimum deposit schedule applicable to each three-year period under the agreement. The minimum deposit shall be calculated taking into consideration the scheduling of the anticipated qualified withdrawals. The purpose of the minimum deposit is to insure that the party has made a sufficient commitment to accomplish its program. See § 390.13 (relating to failure to fulfill a substantial obligation under the agreement).

(4) *Determination of minimum deposits.* The minimum deposit shall be set by the Maritime Administrator. In determining the minimum deposit, the Maritime Administrator shall give consideration to the anticipated ceilings, financial history, current conditions and future business expectations of the party.

(5) *Waiver of minimum deposit.* The Maritime Administrator shall waive a failure to meet the minimum deposit schedule when the party has deposited all allowable taxable income as specified in Article 5(c) of this agreement attributable to the operation of agreement vessels, net proceeds from all sales or other dispositions of agreement vessels, all receipts from the investment or reinvestment of amounts held in the fund and all earned depreciation on agreement vessels. The Maritime Administrator may also waive the minimum deposit schedule in any case where the party can demonstrate

Maritime Administration, DOT

§ 390.8

that such deposits will adversely affect its ability to operate its agreement vessels. In the event of a waiver, the Maritime Administrator may require modification of the schedules. See § 390.6 (relating to administration of the agreement).

(6) *Selection of ceiling.* Except as may be otherwise provided in the agreement or these rules and regulations, the party may choose the ceilings with respect to which deposits are made.

(f) *Allocation of depreciation deposits—*(1) *In general.* 46 U.S.C. 53505(b) provides that in the case of a lessee of an eligible agreement vessel the maximum amount which may be deposited with respect to such vessel, under the depreciation ceiling, shall be reduced by any amount which the owner is required or permitted to deposit with respect to such vessel under its depreciation ceiling.

(2) *Method of allocation.* When an agreement vessel is leased, the party's agreement shall fix a percentage of the annual depreciation which the party may deposit. The percentage shall be that agreed upon between the lessors and the lessees unless the Maritime Administrator determines that the agreed upon percentage will result in an accumulation of assets in the fund or funds which is greater than or less than an amount necessary or appropriate to carry out the party's program. See paragraph (e) of this section (relating to level of deposits).

(g) [Reserved]

(h) *Funds held in trust for investment purposes.* A fund may be transferred in whole or in part to the control of an unrelated trustee for investment purposes with the prior written permission of the Maritime Administrator. The Maritime Administrator shall approve such a transfer when:

(1) The trustee meets the requirements for a depository under paragraph (b) of this section;

(2) The trust instrument provides that all investment restrictions stated in 46 U.S.C. 53506 and § 390.8 of these regulations will be observed;

(3) The trust instrument provides that the trustee will give consideration to the party's withdrawal requirements under the agreement when investing the fund;

(4) The trustee agrees to be bound by all rules and regulations which have been or will be promulgated governing the investment or management of the fund.

(i) *Federal ship mortgage guarantee or insurance.* A fund may serve in lieu of a Restricted Fund required in connection with Federal Ship Mortgage Guarantee or Insurance under 46 U.S.C. Chapter 537 and the regulations thereunder upon approval by the Maritime Administrator. Approval by the Maritime Administrator shall be conditioned upon the execution by the party of an agreement, satisfactory in form and substance to the Maritime Administrator, governing the dual use of the fund. Applications for permission to use the fund in this dual capacity should be made in writing to the Secretary, Maritime Administration.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.8 Investment of the fund.

(a) *In general.* 46 U.S.C. 53506 provides that assets in the fund must be invested in accordance with certain restrictions. The rules in this section provide for the quality of securities, restrictions on the type of stock in which a fund may invest, related company investments and miscellaneous prohibited activities.

(b) *Permissible investments—*(1) *In general.* The party, at its discretion, or the party's trustee, if established pursuant to paragraph (h) of § 390.7, may invest in the types of securities specified in this paragraph.

(2) *Interest bearing securities.* The party or the party's trustee may invest in any obligation of the United States Government, including any agency or instrumentality thereof, and in the interest bearing securities listed below:

(i) Any obligation of a state or local government, including any agency or instrumentality thereof, or any domestic obligation, which is rated by Moody's Investors Service, Inc., as "Baa" or better or by Standard and Poor's Corporations as "BBB" or better;

(ii) Bankers' acceptances, certificates of deposit, repurchase agreements, and short-term commercial obligations,

provided that the latter must be readily marketable and rated not lower than “Prime” by Moody’s Investors Services, Inc. or “B” by Standard & Poor’s Corp.; and

(iii) Any unsubordinated obligation of an issuer that has any unsecured securities with a credit rating of “Baa” or better if rated by Moody’s Investors Services, Inc., or “BBB” or better if rated by Standard and Poor’s Corporation, or by an issuer that has a commercial paper rating not lower than “Prime” by Moody’s Investors Service, Inc. or “B” by Standard and Poor’s Corporation.

(3) *Guaranteed interest bearing securities.* The party or the party’s trustee may invest in interest bearing securities which do not meet the investment criteria set forth in this paragraph (b) *Provided, That:*

(i) The types of interest bearing securities and their terms and conditions are acceptable to the Maritime Administration;

(ii) All principal and interest of the interest bearing securities are unconditionally guaranteed in a form satisfactory to the Maritime Administration and neither the securities nor the obligation to pay interest on the securities is that of a party or a company related to the party within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder; and

(iii) The guarantor, which may be an affiliate of the party, must be either a person that has any unsecured securities with a credit rating of “Baa” or better if rated by Moody’s Investors Services, Inc., or “BBB” or better if rated by Standard & Poor’s Corporations, or a person whose commercial paper rated not lower than “Prime” by Moody’s Investors Services, Inc. or “B” junior securities are rated in the highest grade by Moody’s Commercial Paper Service or in one of the two highest grades by Standard & Poor’s Corporations, and is otherwise acceptable to the Maritime Administration.

(4) *Common and preferred stocks.* The party or the party’s trustee may invest in the following common and preferred stocks:

(i) Stock of domestic corporations which is fully listed and registered at

the time of purchase on an exchange registered with the Securities and Exchange Commission as a national securities exchange and which would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and the preservation of their capital; and

(ii) Preferred stock of a corporation if the common stock of that corporation meets the requirements of this paragraph and if the preferred stock of such corporation would meet such requirements but for the fact that such preferred stock cannot be listed and registered as required because it is nonvoting stock.

(c) *Limitations on investments*—(1) *Interest bearing securities.* The value of securities of any one issuer held in the Fund compared to the value of the total assets of the fund shall not exceed 10 percent in the case of non-governmental securities referred to in paragraph (b)(2)(i) of this section.

(2) *Common and preferred stock.* The value of common and preferred stock of any one issuer held in the fund shall not exceed 25 percent of the value of the total assets of the fund. In no case may more than 60 percent of the value of the total assets of the fund be invested in common or preferred stock.

(3) *Margin or short sale.* No interest bearing securities or common and preferred stock shall be purchased on margin or be sold short for the account of a fund.

(4) *Related company investments.* Funds shall not be invested in the interest bearing securities or common and preferred stock of the party or of a company related to the party within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder.

(5) *Subsequent investments.* If at any time the fair market value of the interest bearing securities or common and preferred stock in the fund is more than the limitations stated in this paragraph (c), any subsequent deposit to or withdrawal from the fund or investment made within the fund shall be made in such a way as tends to restore the fund to a posture in which the fair market values of such securities or stock do not exceed such limitations. Values of such securities and stocks

shall be the fair market values as determined by the party on the last day of each semi-annual and annual reporting period.

[41 FR 4265, Jan. 29, 1976, as amended at 42 FR 34882, July 7, 1977; 43 FR 51636, Nov. 6, 1978; 55 FR 34928, Aug. 27, 1990; 73 FR 56740, Sept. 30, 2008]

§ 390.9 Qualified withdrawals.

(a) *In general*—(1) *Defined*. In accordance with 46 U.S.C. 53509, qualified withdrawals are those made from a fund in accordance with the agreement, but only if they are for:

(i) The acquisition, construction or reconstruction of a qualified agreement vessel;

(ii) The acquisition, construction or reconstruction of barges or containers which are part of the complement of a qualified agreement vessel; or

(iii) The payment of the principal on indebtedness incurred in connection with the acquisition, construction or reconstruction of a qualified agreement vessel or a barge or container which is part of the complement of a qualified agreement vessel.

(2) *Tax aspects of a qualified withdrawal*. For the tax aspects of a qualified withdrawal, see 46 U.S.C. 50510 and § 3.6 of the joint regulations (§ 391.6 of this chapter).

(b) *Purpose of qualified withdrawals*—(1) *Acquisition of qualified agreement vessels*. (i) The term *acquisition of a qualified agreement vessel* shall mean any transaction, including a corporate merger, where the party obtains a proprietary interest in an existing vessel and such a proprietary interest will, in the opinion of the Maritime Administrator, further the purposes and policies of the Act. See § 390.3 (relating to policy considerations).

(ii) Qualified withdrawals for the acquisition of a qualified agreement vessel shall only be allowed for amounts determined by independent appraisal to be the fair market value of the vessel, at the time of the acquisition, or the actual cost directly allocable to acquiring only the vessel, whichever is less.

(2) *Construction of qualified agreement vessels*. The term *construction of a qualified agreement vessel* shall mean the

construction of a vessel with the aid of qualified withdrawals.

(3) *Reconstruction of qualified agreement vessels*. Once an agreement has been entered into, the term *reconstruction of a qualified agreement vessel* shall mean any improvement to an existing vessel which increases the vessel's competitiveness and involves an aggregate sum in excess of \$100,000. The Maritime Administrator may waive the monetary limit in this subparagraph in the case of small vessels.

(4) *Payment of principal on indebtedness*. 46 U.S.C. 53509(a)(2) provides that any indebtedness which the party proposes to pay through qualified withdrawals must be shown to the satisfaction of the Maritime Administrator to have been incurred in direct connection with the acquisition, construction or reconstruction of a qualified agreement vessel. The fact that indebtedness is secured by an interest in a qualified agreement vessel is insufficient by itself to demonstrate the direct connection. It is not necessary that the lien or mortgage securing the indebtedness be on the vessel. For example, if the party mortgages an office building in order to finance the construction of a vessel, payments of principal on the mortgage may be made with qualified withdrawals.

(c) *Limitations on qualified withdrawals*—(1) *Capitalized costs requirement*. All qualified withdrawals must be for costs which are capitalized under the Internal Revenue Code of 1986, as amended, and the regulations thereunder and so reported on the party's Federal Income Tax return.

(2) *Executed contract requirement and reimbursement of general funds*. Qualified withdrawals may be made for the purpose of reimbursing general funds subject to the following limitations:

(i) Qualified withdrawals may not be made until a construction, reconstruction or acquisition contract is executed. However, the party may reimburse its general funds for expenditures applicable to the construction, reconstruction or acquisition contract which occurred prior to the date of contracting if such reimbursements are made within 120 days from the date of such contracting.

§ 390.10

46 CFR Ch. II (10–1–15 Edition)

(ii) The party may also reimburse its general funds for expenditures which could have been paid initially by a qualified withdrawal, if such reimbursements are made within 120 days of such expenditure.

(iii) The party may reimburse its general funds for expenditures made prior to the time an agreement or amendment is entered into, but after the party has made application therefor, if such expenditures would otherwise qualify for reimbursement pursuant to paragraphs (c)(3) (i) and (ii) of this section but for the fact that an agreement or amendment has not been executed, and if such reimbursement is effected within 120 days of the execution of an agreement or amendment.

(3) *Prepayment of indebtedness.* The party shall not prepay principal on indebtedness with qualified withdrawals without the prior written consent of the Maritime Administrator.

(4) *Qualified withdrawals paid to related persons.* A withdrawal, including payments for indebtedness, paid to a related person, within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder, shall not constitute a qualified withdrawal unless the Maritime Administrator determines that no portion of such payment constitutes a dividend, a return of capital or a contribution of capital under the Internal Revenue Code. Transactions which include payments to a related person, will be approved if the cost of the item to be acquired, constructed or reconstructed through qualified withdrawals is or was at the time of the acquisition, construction or reconstruction its fair market value. The party must obtain the prior written permission of the Maritime Administrator before any qualified withdrawals may be paid to a related person. Any such withdrawal prior to approval shall be a nonqualified withdrawal.

(d) *Permission to make qualified withdrawals.* Once a program has been approved, prior approval of the Maritime Administrator is not required for specific qualified withdrawals except as provided in paragraphs (c)(4) and (c)(5) of this section. However, the Maritime Administrator will give prior approval

to qualified withdrawals upon written request.

[41 FR 4265, Jan. 29, 1976, as amended at 55 FR 34929, Aug. 27, 1990; 73 FR 56740, Sept. 30, 2008]

§ 390.10 Nonqualified withdrawals.

(a) *In general*—(1) *Defined.* Any withdrawal from a fund which is not a qualified withdrawal is a nonqualified withdrawal.

(2) *Tax aspects of a nonqualified withdrawal.* For the tax aspects of a nonqualified withdrawal, see 46 U.S.C. 53511 and § 3.7 of the joint regulations (§ 391.7 of this chapter).

(b) *Permission required*—(1) *In general.* The prior written permission of the Maritime Administrator is required before a nonqualified withdrawal may be made.

(2) *Failure to secure permission.* A nonqualified withdrawal made without the prior written permission of the Maritime Administrator shall constitute a material breach of the agreement unless the Maritime Administrator shall determine that failure to obtain prior written consent was excusable. See § 390.13 (relating to failure to fulfill a substantial obligation under the agreement).

(3) *Types of nonqualified withdrawals which will be permitted.* Generally, the Maritime Administrator will give permission to make nonqualified withdrawals when:

(i) The party has incurred operating losses from the operations of agreement vessels which have impaired his working capital and it becomes necessary to reimburse its general funds to the extent of such losses;

(ii) The party desires to make an expenditure for research, development or design and such an expenditure is incident to new and advanced ship design, machinery and equipment;

(iii) The withdrawal would be a qualified withdrawal except for the fact that there is no tax basis left that can be reduced; or

(iv) The party demonstrates, to the satisfaction of the Maritime Administrator, that it cannot fulfill its program due to circumstances beyond its

Maritime Administration, DOT

§ 390.12

control or due to a change in circumstances which makes the completion of its program economically unfeasible.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.11 Sale or other disposition of agreement vessels.

(a) *Eligible agreement vessels.* The sale or other disposition (including mortgages) of eligible agreement vessels shall not require prior approval of the Maritime Administrator, but shall require written notification within 10 days after the sale or other disposition. Such notification shall include a description of the transaction, the identity of the transferee, the proceeds to be realized, the date of the transaction and whether the proceeds will be deposited into the fund.

(b) *Qualified agreement vessels*—(1) *In general.* If a qualified agreement vessel whose basis has been reduced through the application of qualified withdrawals is sold or disposed of (including mortgaged) within one year, interest on the amount of gain attributable to the basis reduction shall attach if the Maritime Administrator determines that the disposition was contrary to the policies of the Act, the joint regulations or these regulations. See § 390.13 (relating to failure to fulfill a substantial obligation under the agreement).

(2) *Period of one year defined.* The one-year period shall mean 365 days from the date of final delivery from the shipyard in the case of construction or reconstruction and 365 days from the date of first loading of the vessel in the case of an acquisition.

(3) *Prior approval.* The party shall obtain the written approval of the Maritime Administrator prior to the sale or other disposition (including mortgage) of a qualified agreement vessel.

(4) *Deposit requirement.* The Maritime Administrator will not normally require the deposit of the net proceeds from the sale of a qualified agreement vessel but shall require the deposit of the net proceeds from the mortgage of a qualified agreement vessel for which qualified withdrawals from the fund have been made.

(c) *Sale or other disposition of agreement vessels to related persons*—(1) *In*

general. Section 3.2(c)(4) of the joint regulations (§ 391.2(c)(4) of this chapter) requires that the net proceeds from the sale or other disposition of an agreement vessel shall be the fair market value of the vessel when the party and the purchaser are owned or controlled directly or indirectly by the same interests within the meaning of section 482 of the Internal Revenue Code of 1986, as amended, and the regulations thereunder. In such case, the party shall furnish data to establish that the amount realized or to be realized is the fair market value.

(2) *Data to be submitted.* Sufficient data must be submitted to support a determination by the Maritime Administrator of the fair market value including the original cost of the vessel, dates of original delivery, acquisition and reconstruction, as applicable, cost of improvements, sales price, costs of sale and any other information which would assist in making such determination.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.12 Liquidated damages.

(a) *Liquidated damages*—(1) *In general.* Each agreement entered into under Chapter 535 shall contain a liquidated damages provision for the purpose of placing the party into its prefund position for each day a qualified agreement vessel is operated in violation of the geographic trading restrictions contained in the Act and § 390.5. The liquidated damages provision requires that the party repay the time value of the deferral of Federal Income Tax which the party has received.

(2) *Calculation of liquidated damages.* The liquidated damages specified in this paragraph shall be calculated as follows:

(i) With respect to each vessel operated in violation of the applicable trading restrictions, add (A) the sum of qualified withdrawals for the vessel which have been made from the ordinary income and capital gain accounts to the date of breach, and (B) the amount of any unpaid principal on indebtedness for the vessel which may be paid from the fund less any portion of such amount which by operation of law

§ 390.12

46 CFR Ch. II (10–1–15 Edition)

must be withdrawn from the capital account balance on deposit in the fund on the date of the breach.

(ii) Multiply the total derived in paragraph (a)(2)(i) of this section by an assumed effective Federal Income Tax rate of 30 percent;

(iii) Compound the product derived in paragraph (a)(2)(ii) of this section at 8 percent annually (A) for 20 years, if the duration of the trading restrictions applicable to the vessel is 20 years in accordance with paragraph (b)(1)(i) of this section; (B) for 10 years, if the duration of the trading restrictions applicable to the vessel is 10 years in accordance with paragraphs (b)(1) (ii), (iii) or (iv) of this section; or (C) for 5 years, if the duration of the trading restrictions applicable to the vessel is 5 years in accordance with paragraph (b)(1)(iv) of this section.

(iv) Subtract the amount calculated in paragraph (a)(2)(ii) of this section from the product derived in paragraph (a)(2)(iii) of this section;

(v) Divide the result derived in paragraph (a)(2)(iv) of this section by 2; and

(vi) Divide the result derived in paragraph (a)(2)(v) of this section (A) by 7300 (days) if the duration of the trading restrictions applicable to the vessel is 20 years; (B) by 3650 (days) if the duration of the trading restrictions applicable to the vessel is 10 years; or (C) by 1825 (days) if the duration of the trading restrictions applicable to the vessel is 5 years.

(3) *Formula.* The calculation of the daily rate of liquidated damages may be reduced to the following formula:

$$X = [I(QT) - S]/2D$$

Where:

X = Daily rate in dollars.

Q = Summation of qualified withdrawals, other than withdrawals from the capital account, permitted from the fund.

T = Assumed effective tax rate of 30 pct.

S = Tax savings = $(Q)(T)$.

I = Discount factor to be applied for vessels subject to 20-yr trading restriction = 4.660957; for vessels subject to 10-yr trading restriction = 2.158925; for vessels subject to 5-yr trading restriction = 1.469328 (value of \$1 compounded at 8 pct for 20, 10, and 5 yr respectively).

D = 7,300 d for vessels subject to 20-yr trading restriction; 3,650 d for vessels subject to 10-yr trading restriction; 1,825 d for vessel subject to 5-yr trading restriction.

The formula may be further reduced to:

$$X = 0.5491436Q/7,300$$

for vessels subject to 20 year trading restriction,

$$X = 0.1738388Q/3,650$$

for vessels subject to 10 year trading restriction,

$$X = 0.0703992Q/1,825$$

for vessels subject to 5 year trading restriction.

(4) *Example.* The provisions of paragraphs (c)(2) and (c)(3) of this section may be illustrated by the following example:

Assume that a qualified agreement vessel has been constructed with qualified withdrawals from a fund. The total cost was \$20 million of which \$6 million was withdrawn from the fund for a downpayment. Pursuant to the agreement, an additional \$4 million may be withdrawn from the fund to pay principal on indebtedness. Thus, \$10 million has been or may be withdrawn from the fund with respect to this vessel. The daily rate of liquidated damages would be:

$$X = 0.5491436 (10,000,000)/7300 \text{ or } X = \$752.25$$

(5) *Payment of liquidated damages.* The amount derived in paragraph (a)(2) of this section shall be the daily rate of liquidated damages and shall be paid to the Maritime Administrator, for deposit in the Treasury of the United States, within 30 days from the date the qualified agreement vessel first entered the prohibited geographic trade and shall be for all amounts owing from such date thereafter until the date payment is due. Payments, for continuing breaches, shall be made at 30 day intervals.

(6) *Other remedies.* Nothing in this paragraph shall diminish the Maritime Administrator's other remedies for breach under the Act, the rules and regulations or the agreement.

(b) *Duration of restrictions—(1) In general.* The geographic trading restrictions in the Act and § 390.5 and the liquidated damages provision shall apply for:

(i) 20 years from the date of final delivery on qualified agreement vessels constructed or acquired within one year of final delivery from the shipyard with the aid of qualified withdrawals;

(ii) 10 years from the date of completion of reconstruction for qualified agreement vessels reconstructed with the aid of qualified withdrawals;

(iii) 10 years from the date of acquisition of qualified agreement vessels acquired with the aid of qualified withdrawals more than one year after final delivery of the vessel from the shipyard;

(iv) 10 years from the date of the first qualified withdrawal from the fund to pay the existing indebtedness on a qualified agreement vessel which was included in Schedule B for that purpose unless the qualified vessel was more than fifteen years old on the date of the first qualified withdrawal in which case the period shall be five years.

(2) *Transfer of qualified agreement vessel.* In the event a qualified agreement vessel is sold or transferred to another person (see paragraph (b)(3) of § 390.11 requiring prior permission), the transferor shall require in the bill of sale that the transferee agree with the Maritime Administrator to comply with the geographic trading restrictions and to pay liquidated damages for any breach of such agreement that occurs after the transfer. The transferor shall remain liable for any violations that occurred prior to the approved transfer. However, in the case of a like kind exchange which is governed by section 1031 of the Internal Revenue Code of 1986, as amended, if the vessel acquired by the party has an economic life equal to or greater than the length of the geographic trading restrictions that remain applicable to the transferred vessel, the acquired vessel shall be deemed to be a qualified agreement vessel and the geographic trading restrictions of the transferred vessel shall attach to the acquired vessel.

[41 FR 4265, Jan. 29, 1976 as amended at 42 FR 34283, July 5, 1977; 73 FR 56740, Sept. 30, 2008]

§ 390.13 Failure to fulfill a substantial obligation under the agreement.

(a) *In general.* 46 U.S.C. 53509(c) requires the Maritime Administrator to determine whether there has been a failure to fulfill a substantial obligation under an agreement.

(b) *Contracting Officer's tentative conclusion*—(1) *Notice.* If the Contracting Officer tentatively concludes that any

substantial obligation under the agreement, the joint regulations or these regulations is not being fulfilled by the party he shall serve written notice of his tentative conclusion upon the party by certified mail with return receipt requested. The notice shall contain the following information:

(i) A statement of the grounds upon which the tentative conclusion is based;

(ii) The amount the Contracting Officer tentatively concludes should be withdrawn as a nonqualified withdrawal; and

(iii) A statement that the tentative conclusion shall become a final decision unless the party requests, within 30 days, an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion.

(2) *Effect of notice.* The notice of the tentative conclusion shall become a final decision as described in paragraph (d)(1) of this section, unless within 30 days of receipt of such a written notice the party by personal delivery or by certified mail, requests the opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, in which case no further withdrawals from the fund, without the written prior approval of the Contracting Officer, shall be made by the party until a binding final decision is reached by the Maritime Administration.

(c) *Basis for Contracting Officer's tentative conclusion.* In determining whether a party has not fulfilled a substantial obligation under its agreement, the Contracting Officer shall consider among other things:

(1) The effect of the party's action or omission upon its ability to either carry out the purpose of the fund, accomplish its Schedule B program (see § 390.4(c)) or satisfy its minimum level of deposits in Schedule D (see § 390.4(e)).

(2) Whether the party has made material misrepresentations in connection with its application, agreement or any modification or amendment thereto or has failed to disclose material information that may affect its agreement or the purpose of the fund.

(d) *Contracting Officer's decision and appeals to the Maritime Administrator—*

(1) *Where there has not been a request to cure or to be heard.* If the Contracting Officer issues a written notice under paragraph (b) of this section and the party does not request within 30 days an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, the Contracting Officer's tentative conclusion shall become the final decision, which decision shall be final, conclusive and binding upon the party, and no appeal therefrom shall be taken to the Maritime Administrator.

(2) *Where there has been a request to cure or to be heard.* If the Contracting Officer issues a written notice under paragraph (b) of this section and the party requests within 30 days an opportunity either to cure its breach or to be heard and offer evidence in opposition to the tentative conclusion, the party shall be offered such an opportunity. Request to cure must include a proposal to cure the breach. If the Contracting Officer accepts the party's proposal to cure its breach, then such determination shall be final. A party requesting to be heard and offer evidence in opposition to the Contracting Officer's tentative conclusion shall be permitted to submit, in writing, any information, evidence or argument within a period set by the Contracting Officer after considering the wishes of the party. The Contracting Officer shall reduce his final decision to writing and furnish the party a copy, by certified mail—return receipt requested, which decision shall be final and conclusive and shall bind the party unless within 30 days of receipt of the decision the party appeals from said decision by personal delivery or by certified mail to the Maritime Administrator with notice to the Contracting Officer.

(e) *Appeals to the Maritime Administrator.* Appeals with a request for a hearing on the record, if desired, are to be transmitted pursuant to paragraph (d) of this section and are to be addressed to the Maritime Administrator. Upon the filing of an appeal, the Contracting Officer shall transmit the entire record and a copy of his final decision to the Maritime Administrator. If

a request for a hearing on the record is granted, the Maritime Administrator shall proceed pursuant to the Rules of Practice and Procedure in Part 201 of this title. The decision of the Maritime Administrator on any question of fact shall be final, conclusive and binding upon the party unless determined by a court of competent jurisdiction to be fraudulent, capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008]

§ 390.14 Departmental reports and certification.

(a) *In general.* For each calendar year, the Secretary of Transportation shall provide the Secretary of the Treasury, within 120 days after the close of such calendar year, a written report with respect to those capital construction funds under the Secretary of Transportation's jurisdiction.

(b) *Content of reports.* Each report shall set forth the name and taxpayer identification number of each person:

- (1) Establishing a capital construction fund during such calendar year;
- (2) Maintaining a capital construction fund as of the last day of such calendar year;
- (3) Terminating a capital construction fund during such calendar year;
- (4) Making any withdrawal from or deposit into (and the amounts thereof) a capital construction fund during such calendar year; or
- (5) With respect to which a determination has been made during such calendar year that such person has failed to fulfill a substantial obligation under any capital construction fund agreement to which such person is a party.

[55 FR 34929, Aug. 27, 1990]

APPENDIX I TO PART 390—U.S. DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION—APPLICATION INSTRUCTIONS

INSTRUCTION REGARDING APPLICATION FOR A CAPITAL CONSTRUCTION FUND

An application for a capital construction fund under 46 U.S.C. 53501 *et seq.*, the Rules and Regulations prescribed jointly by the

Secretary of the Treasury and the Secretary of Transportation (26 CFR Part 3 and reprinted in 46 CFR Part 391, the "Joint Regulations") and individually by the Secretary of Transportation (46 CFR Part 390, the "SOC Regulations") shall be prepared and submitted in the form specified by these instructions.

The application must be legible and shall be submitted in six (6) complete sets, including the required Schedules and Exhibits. The application shall be filed with the Secretary, Maritime Administration, Washington, DC 20590. Three of these sets must be duly executed and certified by the Applicant. The name of the Applicant shall be shown on all accompanying papers for identification.

All questions contained in the application must be responded to; if a question is not applicable the respondent should so state. Additional information may be requested if such information is necessary to aid the Contracting Officer in making a determination to enter into a Capital Construction Fund Agreement.

U.S. DEPARTMENT OF TRANSPORTATION,
MARITIME ADMINISTRATION

APPLICATION FOR ESTABLISHMENT OF A CAPITAL CONSTRUCTION FUND UNDER SECTION 607, MERCHANT MARINE ACT, 1936, AS AMENDED

The undersigned _____ ("Applicant"), a citizen of the United States within the meaning of 46 U.S.C. 50501, as amended, hereby applies under section 607 of the Merchant Marine Act, 1936, as amended ("Act"), the Rules and Regulations jointly prescribed by the Secretary of the Treasury and the Secretary of Transportation ("Joint Regulations") and individually by the Secretary of Transportation ("SOC Regulations") to establish a Capital Construction Fund to aid in the acquisition, construction or reconstruction of a qualified vessel, the acquisition, construction or reconstruction of barges, containers or trailers which are part of the complement of a qualified vessel and the payment of the principal on indebtedness incurred in connection with the acquisition, construction or reconstruction of a qualified vessel or a barge, container or trailer which is part of the complement of a qualified vessel. The fund hereby applied for will be effective for deposits relating to the taxable year beginning _____, 20____ and ending _____, 20____, and for subsequent taxable years. In support of this application, the Applicant submits the following information:

I. *As to the identity of and other General Information of the Applicant* (the following data is required to prove the Applicant's citizenship to the satisfaction of the Secretary; also see 46 CFR Part 355):

A. *Natural Persons.* If the Applicant is a natural person, the following identifying information should be submitted:

1. Name.
2. Address.
3. Date of birth.
4. Place of birth.
5. Citizenship.
6. Principal place of business.
7. Trade name under which business is conducted.

B. *Partnerships, Associations, Unincorporated Companies.* If the Applicant is a partnership, association, or unincorporated company, the following identifying information should be submitted:

1. Name of partnership, association, or unincorporated company.
2. Business address.
3. Date and place of organization.
4. Name of all partners (general, limited and special) of the partnership or trustees and holders of beneficial interests in the association or company.
5. Share owned by each partner, trustee, or beneficial owner.
6. Date of birth of each.
7. Place of birth of each.
8. Citizenship of each.

C. *Incorporated Companies.* If the Applicant is an incorporated company, the following identifying information should be submitted:

1. Exact name of Applicant.
2. State in which incorporated and date of incorporation.
3. Address of principal executive offices, and of important branch offices, if any.
4. The following information with respect to each officer and director of the corporation:
 - a. Name and address.
 - b. Office.
 - c. Citizenship.
 - d. Capital shares owned (specify type, whether voting or non-voting and percentage of total of each type issued if five percent (5%) or more).
5. The name, address and citizenship of and number of capital shares owned by each person not named in answer to item 4, owning of record, or beneficially if known, five percent (5%) or more of the issued capital shares of any class stock of the Applicant.
6. A brief statement of the general effect of each voting agreement, voting trust, or other arrangement whereby the voting rights in any shares of the Applicant are owned, controlled, or exercised, or whereby the control of the Applicant is in any way held or exercised by any person not the holder of legal title to such shares. (Give the name, address, citizenship, and business of any such person, and, if not an individual, include the form of organization.)

II. *As to the Business and Affiliations of the Applicant.* A. A brief description of the principal business activities during the past five

years of the Applicant and of any predecessor or predecessors of the Applicant; if any change is presently contemplated, a brief statement of the nature and circumstances thereof.

B. A list of all companies or persons that are related within the meaning of section 482 of the Internal Revenue Code of 1954, as amended, and the regulations thereunder (“related companies”) or that directly or indirectly through one or more intermediaries, control, are controlled by, or are under common control with the Applicant, together with an indication of the nature of the business transacted by each, the relationships between the companies named, and the nature and extent of the control. This information may be furnished in the form of a chart.

C. A statement whether during the past 5 years the Applicant or any predecessor or related company has been in bankruptcy or in reorganization under II-B of the Bankruptcy Act or in any other insolvency or reorganization proceedings, and whether any substantial property of the Applicant or any predecessor or related company has been acquired in any such proceeding or has been subject to foreclosure or receivership during such period. If so, give details.

D. A statement of whether the Applicant or any predecessor or related company is now or during the past 5 years was involved in any litigation or subject to any outstanding judgments. If so, give details.

E. Describe any contemplated plan of reorganization or recapitalization involving new capital, the consolidation or mergers of the Applicant with related or other companies, debt elimination, or other changes or modifications in the corporate or individual structure, and indicate by appropriate financial statements the anticipated results thereof.

III. *As to the Management of the Applicant.*

A. A brief description of the principal business activities during the past 5 years of each director and each principal executive officer of the Applicant.

B. The name and address of each other organization engaged in business activities related to those carried on or to be carried on by the Applicant with which any person named in the answer to the preceding item has any present business connection; the name of each such person, and briefly the nature of such connection.

IV. *Description of Vessels, Barges, Containers or Trailers which Applicant Proposes to be Incorporated in Capital Construction Fund Agreement for the Purpose of Making Deposits.* Vessels must be eligible vessels as that term is defined in 46 U.S.C. 53501 and §390.5(b) of the SOC Regulations. Undocumented barges, containers or trailers must be part of the complement of an eligible vessel as that term is defined in section 607(b) of the Act and §390.5(d) of the SOC Regulations:

A. *Vessels.* Provide in a tabular form headed “Schedule A” (see prescribed format in appendix II) the vessels owned or leased by the Applicant which the Applicant proposes to be designated as “Eligible Agreement Vessels” for the purposes of making deposits into a Capital Construction Fund pursuant to the provisions of 46 U.S.C. 53501 *et seq.*, giving:

- a. Name and official number.
- b. Specific type.
- c. Capacity (tons of cargo, number of containers, barges, etc.).
- d. Whether owned or leased, and if leased the owner and the owner’s address.
- e. Date and place of construction.
- f. If reconstructed, date of redelivery and place of reconstruction.
- g. Date documented under laws of the United States.
- h. Area of operation.

i. Full details concerning the service in which the Applicant operates or will operate each vessel; if the vessel is used for multiple purposes indicate the percentage of time in which the vessel is engaged in each service.

B. *Barges, Containers, and Trailers.* Provide in a tabular form headed “Schedule A” (see prescribed format in appendix II) the barges, containers, and trailers owned or leased by the Applicant which the Applicant proposes to be incorporated in an Agreement for purposes of making deposits into a Capital Construction Fund pursuant to the provisions of 46 U.S.C. 53501 *et seq.*, giving:

- a. Number of barges, containers or trailers which are part of the complement of an eligible vessel; name and official number of barges which are not a part of the complement of an eligible vessel.
- b. Specific type.
- c. Size or capacity.
- d. Whether owned or leased, and if leased the owner and the owner’s address.
- e. Date and place of construction.
- f. If reconstructed, date of redelivery and place of reconstruction.
- g. Date documented under the laws of the United States.
- h. Area of operation.
- i. The vessel or vessels for which the barges, containers and trailers are part of the complement; full details concerning the service in which the Applicant operates or will operate each barge which is not a part of a complement.

V. *Purposes for which Qualified Withdrawals are Proposed.* Applicant is advised that information furnished in response to sections A, B, C and D of this item is for the purpose of inducing the United States to enter into an agreement to establish a Capital Construction Fund pursuant to 46 U.S.C. 53501 *et seq.* In connection therewith attention is directed to 46 U.S.C. 53509(c) which states, “Under joint regulations, if the Secretary of Transportation determines that any substantial

obligation under any agreement is not being fulfilled, he may, after notice and opportunity for hearing to the person maintaining the fund, treat the entire fund or any portion thereof as an amount withdrawn from the fund in a nonqualified withdrawal." Also see § 390.13 of the SOC Regulations.

A. *Acquisition or Construction of Vessels.* Provide in form headed "Schedule B" (see prescribed format in appendix II) the proposed program for the acquisition or construction of vessels, giving:

- a. Number, type and commercial characteristics of vessels to be acquired or constructed.
- b. Whether vessels will be replacements or additions, and if replacements identify vessels to be replaced.
- c. Projected date of acquisition or award of construction contract.
- d. Projected date of commencing operations.
- e. Estimated total cost.
- f. Method by which estimated total cost of project was determined.
- g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.
- h. Estimated amount of borrowings and the amount of such borrowings to be retired by qualified withdrawals from the Capital Construction Fund, including anticipated terms of such financing.
- i. Intended area of operation.
- j. Full details concerning the use of the proposed vessel; if the vessel is to be used for multiple purposes indicate the approximate percentage of time in which the vessel will be engaged in each service.

B. *Acquisition or Construction of Barges, Containers and Trailers.* Provide in a form headed "SCHEDULE B" (see prescribed format in appendix II) the proposed program for acquisition or construction of barges, containers and trailers giving:

- a. Number, type and size of barges, containers and trailers.
- b. Whether barges, containers and trailers will be replacements or additions, if replacements, identify barges, containers or trailers to be replaced.
- c. Projected date of acquisition or award of construction contract.
- d. Projected date of introduction into service.
- e. Estimated total cost.
- f. Method by which estimated total cost of project was determined.
- g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.
- h. Estimated amount of borrowings and the amount of such borrowings to be retired by qualified withdrawals from the Capital Construction Fund including anticipated terms of such financing.

i. Identification of vessels for which the barges, containers and trailers will be part of the complement, and the vessel's area of operation. In the case of barges which are not a part of the complement of a vessel provide the barges' intended area of operation.

j. Full details concerning the use of the proposed barge; if the barge is to be used for multiple purposes indicate the approximate percentage of time in which the barge will be engaged in each service.

C. *Reconstruction of Vessels.* Provide in a form headed "SCHEDULE B" (see prescribed format in appendix II) the proposed program for reconstruction of vessels, giving:

- a. Identification of vessels to be reconstructed.
- b. Nature and extent of proposed reconstruction.
- c. Projected date of award of reconstruction contract.
- d. Projected date of commencing operations with reconstructed vessels.
- e. Estimated total cost.
- f. Method by which estimated total cost of project was determined.
- g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.
- h. Estimated amount of borrowings and amount of such borrowings to be retired by qualified withdrawals from the Capital Construction Fund, including anticipated terms of such financing.
- i. Intended area of operation.
- j. Full details concerning the use of the proposed vessel; if the vessel is to be used for multiple purposes indicate the approximate percentage of time in which the vessel will be engaged in each service.

D. *Reconstruction of Barges, Containers and Trailers.* Provide in a form headed "SCHEDULE B" (see prescribed format in appendix II) the proposed program for reconstruction of barges, containers and trailers, giving:

- a. Number, type and size of barges, containers and trailers.
- b. Nature and extent of proposed reconstruction work.
- c. Projected date of award of reconstruction contract.
- d. Projected date of completion of reconstruction work.
- e. Estimated total cost.
- f. Method by which estimated total cost of project was determined.
- g. Estimated amount of Capital Construction Fund monies to be used as down payment by the Applicant.
- h. Estimated amount of borrowings and amount of such borrowings to be retired by qualified withdrawal from the Capital Construction Fund including anticipated terms of such financing.
- i. Identification of vessels for which the barges, containers, and trailers will be part of the complement, and the vessel's area of

operations. In the case of barges which are not a part of the complement of a vessel provide the barges' area of operation.

j. Full details concerning the use of the proposed barge; if the barge is to be used for multiple purposes indicate approximate percentage of time in which the barge will be engaged in each service.

E. *Payment of Principal on Existing Indebtedness Incurred in Connection with the Acquisition, Construction or Reconstruction of a Qualified Vessel or a Barge, Container or Trailer which is Part of the Complement of a Qualified Vessel.* Provide in a form headed "Schedule B" (see prescribed format in appendix II) the proposed program for payments of principal on existing indebtedness incurred in connection with the acquisition, construction, or reconstruction of qualified vessels, barges, containers, or trailers, giving:

a. Name, official number or other identifying information for the vessel, barge, container, or trailer.

b. Whether the debt was incurred for acquisition, construction or reconstruction, demonstrating evidence of a direct connection between the qualified vessel and the debt which was incurred.

c. The aggregate principal balance of such indebtedness as of the date of this application.

d. The dates and amounts of payments of principal to liquidate the outstanding debt in accordance with the applicable loan agreements or other documents.

VI. *As to the Depository to be Used for the Capital Construction Fund.* Provide in a tabular form headed "Schedule C" (see prescribed format in appendix II) the full name and complete address of the financial institution which will act as depository. Indicate the type of account, i.e., checking, savings, trust, in which the fund will be held.

VII. *Proposed Schedule of Minimum Amounts Available for Deposit into the Capital Construction Fund.* Provide in a tabular form headed "Schedule D" (see prescribed format in appendix II) a proposed program for deposits into the Capital Construction Fund commencing with the beginning of the first taxable year for which the Agreement applies. The applicant is advised that the purpose of Schedule D is to insure that a sufficient commitment has been made to accomplish the objectives contained in Schedule B. Minimum annual deposits are not required, but a minimum amount must be deposited for each 3 year period under the Agreement. For each such 3 year period of the proposed Schedule D the Applicant will indicate not only the minimum amount to be deposited, but also the source of such deposit, giving amounts expected to be derived from:

a. Ordinary income attributable to the operation of agreement vessels.

b. Net proceeds from the sale or other disposition of agreement vessels.

c. Receipts from the investment or reinvestment of amounts held in the fund.

d. Earned depreciation on agreement vessels.

VIII. *Financial Statements and Reports of the Applicant Including Predecessors.* A. *Financial Statements.* For each of the past three fiscal years provide:

1. Statements of Financial Conditions.

2. Statements of Operations.

3. Statements of Retained Earnings.

B. *Reports.* If the books of the Applicant were audited by an independent certified public accountant copies of the public accountant's reports shall be submitted for each of the past three fiscal years.

IX. *As to Exhibits Furnished.* At the time of original filing, the following exhibits, properly identified, shall be furnished:

Exhibit I—A copy of the Certificate of Incorporation of the Applicant or other organization papers including all amendments thereto presently in effect.

Exhibit II—A copy of the By-Laws or other governing instruments of the Applicant, including all amendments thereto presently in effect.

Exhibit III—Such other financial statements, copies of contracts, schedules and other required data which the Applicant desires to incorporate by reference.

X. A statement of any additional information which, in the opinion of the Applicant, is necessary to make the application and attached exhibits true and complete.

XI. A specific written request, pursuant to 5 U.S.C. 552(b)(4), must accompany the application if the Applicant wishes certain trade secrets, financial and commercial information contained in this application to be withheld from disclosure. The Maritime Administrator, Department of Transportation will endeavor to respect such a request, acting within the limits of the applicable provisions of the Freedom of Information Act.

State of _____ County of _____ ss.:

Dated _____, 20____

Name _____ of _____ Applicant

By _____ Name and Title

I, _____, do certify that I am the (Title of Office) of (Exact Name of Applicant), the Applicant on whose behalf I have executed the foregoing application; that the Applicant is a citizen of the United States within the meaning of 46 U.S.C. 50501; that this application is made for the purpose of inducing the United States of America to permit the Applicant, pursuant to section 607 of the Merchant Marine Act, 1936, as amended, the Joint Regulations and the SOC Regulations to establish a Capital Construction Fund for the purposes set forth in 46 U.S.C. 53501; that I have carefully examined the application and all documents submitted in connection

Maritime Administration, DOT

Pt. 390, App. II

therewith and, to the best of my knowledge, information and belief, the statements and representations contained in said application and related documents are full, complete, accurate, and true.

Subscribed and sworn to before me, a _____ in and for the State and County above named, this _____ day of _____, 20____.

My Commission expires _____.

NOTE: The United States Criminal Code makes it a criminal offense to knowingly and willfully falsify, conceal or cover up by any trick, scheme, or device, a material fact from, or make any false, fictitious or fraudulent statements or representations or make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement to, any department or government agency of the United States as to any matter within its jurisdiction (18 U.S.C. 1001).

[41 FR 4265, Jan. 29, 1976, as amended at 73 FR 56740, Sept. 30, 2008; 74 FR 17097, Apr. 14, 2009]

APPENDIX II TO PART 390—SAMPLE CAPITAL CONSTRUCTION FUND AGREEMENT

[Contract No. MA/CCF—]

CAPITAL CONSTRUCTION FUND AGREEMENT WITH

This Capital Construction Fund Agreement ("Agreement"), made on the date hereinafter set forth, by and between the United States of America, represented by the Maritime Administrator, Department of Transportation ("Maritime Administrator"), and _____, a corporation organized and existing under the laws of the State of _____ ("Party"), a citizen of the United States of America.

Whereas: 1. The Party has applied for the establishment of a Capital Construction Fund ("Fund") under section 607 of the Merchant Marine Act, 1936, as amended ("Act");

2. The Party is the owner or lessee or has contracted for the construction of one or more eligible vessels as defined in 46 U.S.C. 53501, which vessels are listed in Schedule A hereof;

3. The Party has a program for the construction or acquisition of qualified agreement vessels as defined in 46 U.S.C. 53501, which program is described in Schedule B hereof;

4. The Maritime Administrator and the Party desire to enter into an Agreement for the purpose of providing replacement vessels, additional vessels, or reconstruction vessels, built in the United States and documented under the laws of the United States for operation in the United States foreign,

Great Lakes, or noncontiguous domestic trade;

5. The Maritime Administrator has determined that the Party qualifies for an Agreement under the Act; and

6. The Maritime Administrator has authorized the award of an Agreement upon the terms and conditions set forth herein subject to the Act, as it may be amended from time to time, and such rules and regulations as shall be prescribed by the Secretary of Transportation or his delegate, either alone or jointly with the Secretary of the Treasury, as necessary to carry out the powers, duties, and functions vested in them by the Act ("rules and regulations").

Now, therefore in consideration of the premises the Maritime Administrator and the Party hereby agree as follows:

1. *Establishment of a Fund:* (A) A Fund is hereby established for the purposes set forth in Article 2 hereof, pursuant to such terms and conditions as shall be prescribed in this Agreement, the Act, or the rules and regulations.

(B) The Fund shall be established in the depositories listed in Schedule C hereof.

2. *Purpose of the Fund:* The Fund established hereunder shall be utilized to provide for replacement vessels, additional vessels, or reconstructed vessels, built in the United States and documented under the laws of the United States for operation in the United States foreign, Great Lakes, or noncontiguous domestic trade, and to provide for qualified withdrawals to achieve the program set forth in Schedule B hereof.

3. *Term of the Agreement:* This Agreement shall be effective on the date of execution by the Maritime Administrator and shall continue until terminated under Article 4.

4. *Termination of Agreement:* (A) This Agreement may be terminated at any time under any of the following circumstances:

(1) Upon written mutual agreement by the parties;

(2) Upon written notice by the Party that a change has been made in the rules and regulations which would have a substantial effect upon the rights or obligations of the Party.

(B) This Agreement shall terminate upon completion of the program as set forth in Schedule B hereof.

(C) Upon termination of this Agreement pursuant to paragraphs (A) and/or (B) hereof all amounts remaining in the Fund shall be treated as if withdrawn in a nonqualified withdrawal (as that term is defined in the Act and the rules and regulations) on the date of termination of this Agreement.

5. *Deposits to be made into the Fund:* (A) Subject to any restrictions contained in the Act, the rules and regulations, or this Agreement, the Party may deposit, for each taxable year to which this Agreement applies, amounts representing:

(1) Taxable income attributable to the operation of the vessels listed in Schedule A or B hereof;

(2) The depreciation allowable under section 167 of the Internal Revenue Code of 1986, on the vessels listed in Schedule A or B hereof;

(3) The net proceeds from the sale or other disposition of any of the vessels listed in Schedule A or B hereof; and

(4) The net proceeds from insurance or indemnity attributable to the vessels listed in Schedule A or B hereof.

(B) The Party shall deposit for each taxable year to which this Agreement applies:

(1) All receipts from the investment or re-investment of amounts held in the Fund, except that the Party shall not be permitted to deposit more than is necessary to complete its program set out in Schedule B hereof; and

(2) The net proceeds from the mortgage of any vessel listed in Schedule B hereof for which qualified withdrawals from the Fund have been made.

(C) Notwithstanding anything in paragraph (A) or (B) hereof to the contrary, the Party shall make the minimum deposits set forth in Schedule D hereof at the time and in such amounts as may be set forth therein. The Party specifically agrees to deposit up to one hundred percent of allowable taxable income attributable to the operation of agreement vessels in order to meet its obligations under this paragraph.

(D) In the event that any leased vessel listed in Schedule A hereof is included in another capital construction fund agreement, the maximum amount of depreciation which the Party may deposit in respect to that vessel shall be calculated by using the allowable percentage of the depreciation ceiling listed for that vessel in Schedule A hereof.

6. *Withdrawals from the Fund:* (A) The Party may make such qualified withdrawals (as that term is defined in the Act and the rules and regulations) as shall be necessary to fulfill the obligations set forth in Schedule B hereof. Any such qualified withdrawal may be made without the consent of the Maritime Administrator, except as required by the rules and regulations.

(B) Any other withdrawal from the Fund shall be made only upon the prior written consent of the Maritime Administrator, as required by the rules and regulations.

7. *Investment of the Fund:* (A) The Party, at its discretion, may invest assets held in the Fund in accordance with the Act and the rules and regulations.

(B) The Party agrees that when investing assets held in the Fund to make such investments as will insure that sufficient cash is available at the time qualified withdrawals are required in accordance with the program described in Schedule B hereof.

8. *Pledges, Assignments and Transfers:* (A) The Party agrees not to assign, pledge or

otherwise encumber, either directly or indirectly or through any reorganization, merger, or consolidation, all or any part of this Agreement, the Fund, or any assets in the Fund without the prior written consent of the Maritime Administrator; *Provided, however,* The Party may transfer the assets of the Fund, in whole or in part, to an investment trustee, as provided in the rules and regulations.

(B) The Party shall not obligate any assets in the Fund as a compensating balance.

(C) The Party may not sell, transfer or otherwise dispose of any vessel, or part thereof, described in Schedule B hereof without the prior written consent of the Maritime Administrator.

9. *Records and Reports:* (A) The Party and each affiliate, domestic agent, subsidiary or holding company connected with, or directly or indirectly controlling or controlled by the Party shall keep its books, records, and accounts relating to the maintenance, operation, servicing of the vessel(s) and/or service(s) covered by this Agreement in such form as may be prescribed by the Maritime Administrator under the rules and regulations.

(B) The Maritime Administrator agrees not to require the duplication of books, records and accounts required to be kept in some other form by the Interstate Commerce Commission or the Secretary of the Treasury, so long as the information required in paragraph (A) hereof is made available to the Maritime Administrator.

(C) The Party agrees to file, upon notice from the Maritime Administrator, balance sheets, profit and loss statements, and such other statements of financial operations, special reports, charters, ships' logs, memoranda of facts and transactions, as in the opinion of the Maritime Administrator may affect the Party's performance under this Agreement.

(D) The Maritime Administrator may require by regulation that any of such statements, reports and memoranda shall be certified by independent certified public accountants acceptable to the Maritime Administrator.

(E) The Maritime Administrator may require the Party to establish and maintain systems of control of expenses and revenues in connection with the operation of the agreement vessel(s).

(F) The Party agrees to submit promptly to the Maritime Administrator any contract executed in connection with the program described in Schedule B hereof.

(G) The Maritime Administrator is hereby authorized to examine and audit the books, records, and accounts of all persons referred to in this Article whenever he may deem it necessary or desirable.

10. *Modification and Amendment:* This Agreement may be modified or amended at any time by mutual written consent.

11. *Incorporation of Schedules:* The attached Schedules A, B, C, and D are incorporated into and made a part of this Agreement.

12. *Liquidated Damages:* (A) In the event that the Party operates any qualified agreement vessel described in Schedule B hereof in geographic trades other than those permitted by 46 U.S.C. 53501 *et seq.*, this Agreement, and/or the rules and regulations, the Party shall pay to the United States an amount of liquidated damages for each day of such impermissible geographic trading which shall constitute the time value of the deferral of Federal income tax which the Party has received. The amount shall be calculated in accordance with the rules and regulations.

(B) The Party agrees to pay the daily rate of liquidated damages to the Maritime Administrator, for deposit in the Treasury of the United States, within the time limits provided for in the rules and regulations.

(C) Nothing in this Article shall in any way be construed to diminish or waive any of the Maritime Administrator's other remedies for breach under the Act, the Agreement, or the rules and regulations.

(D) Notwithstanding the fact that the Agreement may be terminated pursuant to the provisions of Article 4 hereof, or otherwise, the provisions of this Article 12 shall continue in effect as follows:

(1) In the case of a vessel constructed or acquired within one year of final delivery from the shipyard after construction with the aid of qualified withdrawals, for a period of twenty (20) years from the date of such vessel's final delivery;

(2) In the case of a vessel reconstructed or acquired more than one year after final delivery from the shipyard after construction with the aid of qualified withdrawals, for a period of ten (10) years from the date of such vessel's final delivery from the shipyard after reconstruction or the date of such vessel's acquisition; and

(3) In the case of a vessel included in Schedule B hereof as a qualified agreement vessel in regard to which qualified withdrawals from the Fund have been made to pay existing indebtedness, for a period of ten (10) years from the date of the first qualified withdrawal in regard to such vessel. *Provided, however,* That if such vessel was more than fifteen (15) years old on the date of the first qualified withdrawal in regard thereto, such conditions shall continue for a period of five (5) years in regard to such vessel.

13. *Warranties and Representations by the Party:* The Party hereby warrants and represents that:

(A) The Party is a citizen of the United States within the meaning of section 2 of the Shipping Act, 1916, as amended, and will con-

tinue to be so for the term of this Agreement. The Party agrees that, each year, within thirty (30) days after the annual meeting of its stockholders, it shall file a supplemental affidavit as evidence of its continuing United States citizenship, provided that any changes in data last furnished with respect to officers, directors, and stockholders holding five percent or more of the issued and outstanding stock of each class or series which would result in a loss of the Party's status as a United States citizen shall be promptly reported to the Maritime Administrator.

(B) The Party owns, is the lessee, or has contracted for the construction of one or more eligible vessels (within the meaning of 46 U.S.C. 53501) as listed in Schedule A hereof.

(C) The qualified vessels described in Schedule B hereof: (1) Were or will be constructed or reconstructed in the United States, except as provided in the Act and the rules and regulations;

(2) Are or will be documented under the laws of the United States and will continue to remain so documented; and

(3) Will be operated in the foreign, Great Lakes or noncontiguous domestic trade of the United States within the meaning of the Act and the rules and regulations

(D) The Party will meet its deposit obligations as agreed upon in Article 5 of this Agreement.

(E) The Party will promptly inform the Maritime Administrator, in writing, of any change in circumstances which would tend to adversely affect the ability of the Party to carry out its obligations under the Agreement.

(F) The Party will faithfully conform to all rules and regulations governing the Agreement and the Fund.

(G) Nothing of monetary value has been improperly given, promised, or implied for entering into this Agreement. The Party further warrants that no improper personal, political or other activities have been used or attempted in an effort to influence the outcome of the discussions or negotiations leading to the award of this Agreement. Breach of this warranty shall constitute an event of default for which the Maritime Administrator shall have the right, notwithstanding Article 4, to terminate this Agreement without liability to the United States.

14. *Default in Obligations:* (A) If the Maritime Administrator determines that any substantial obligation under this Agreement is not being fulfilled by the Party, he may, under the rules and regulations and after the Party has been given notice and an opportunity to be heard, declare a breach and treat the entire Fund, or any portion thereof, as an amount withdrawn in a non-qualified withdrawal.

Pt. 390, App. II

46 CFR Ch. II (10–1–15 Edition)

(B) The Maritime Administrator shall provide an opportunity for the Party to cure a breach declared pursuant to Paragraph (A) of this Article 14.

(C) Events of breach by the Party shall include, but shall not be limited to: (1) Failure in any respect to use due diligence in performing the program set forth in Schedule B hereof;

(2) Obligating the assets in the Fund as a compensating balance;

(3) Failure to make deposits required in Schedule D hereof;

(4) Failure to secure written permission from the Maritime Administrator when such permission is required by the rules and regulations;

(5) Failure to submit reports and/or records on a timely basis as provided in Article 9 hereof;

(6) Any material misrepresentation made by the Party or any failure by the Party to disclose material information in connection with this Agreement whether before or after execution hereof and whether made in an application, report, affidavit, or otherwise; or

(7) Failure by the Party to comply with any provisions of 46 U.S.C. 53501 *et seq.*, the rules and regulations, or this Agreement.

15. *Extension of Federal Income Tax Benefits:*
The Maritime Administrator agrees that the Federal income tax benefits provided in the Act and the rules and regulations shall be available to the Party if the Party shall carry out its obligations under this Agreement.

UNITED STATES OF AMERICA, MARITIME ADMINISTRATOR, DEPARTMENT OF TRANSPORTATION

(SEAL)
Attest:

By _____
(Secretary)

(SEAL)
By _____
(Secretary)
Attest:

By _____
(Contracting Officer)

(Secretary)

Approved as to form: (Date of Execution)
By _____
(Assistant General Counsel, Maritime Administration) (President)

XYZ Co—SCHEDULE A—ELIGIBLE AGREEMENT VESSELS

(a)	(b)	(c)	(d)	(e)
Name of vessel	Specific type	Capacity	Owned or leased and owner is leased	Date and place constructed
SS <i>Smith</i> , official No. 236425..	Tanker	56,000 dwt	Leased: ABC Ships, Inc., San Diego, Calif., 50 percent of depreciation ceiling.	1962, American Steel, San Francisco, Calif.
SS <i>Brown</i> , official No. 325111.	.....do	265,000 dwt	Owned	1974, Southern Shipyards, Mobile, Ala.
SS <i>Jones</i> , official No. 190528..	Container ship	30,000 dwt, 500 400-ft containers.	.....do	1954, Bond Shipyard, New York, N.Y.
<i>Hercules</i> , official No. 256,125.	Oceangoing tugboat ...	105 ft 2,000 hp .....	.....do	1968, Washington Iron Works, Seattle, Wash.
XYZ-1, official No. 257,164.	Roll-on, roll-off barge ...	1,200 gr ton, 45 40-ft containers.	.....do	1968, Washington Iron Works, Seattle, Wash.
XYZ-2, official No. 260,138.	.....do .....	.....do .....	.....do	1969, Washington Iron Works, Seattle, Wash.
OTC-35, official No. 262,170.	.....do	1,500 gr ton, 60 40-ft containers.	Leased: Oregon Towing Co., Portland, Ore., 100 percent of depreciation ceiling.	1969, J. & J. Shipyard, Portland, Ore.
200 trailers, Nos. 111032–A–10677B–1M through 11032–A–10877B–1M.	Dry cargo	40 ft	Leased: International Leasing Co., New York, N.Y. 0 percent of depreciation ceiling.	1968, Acme Container Corp., New York, N.Y.
1,500 containers, Nos. 312 A through 1312 A..	Refrigerated dry cargo.	.....do	Owned	1969, Aluminum Products, Inc., Dallas, Tex.

XYZ Co—SCHEDULE A—ELIGIBLE AGREEMENT VESSELS (CONTINUED)

	(f)	(g)	(h)	(i)
	Date and place reconstructed	Date documented	Area of operation	Details of service
SS <i>Smith</i> , official No. 236425.	Not available	1962	Noncontiguous domestic trade.	Carriage of crude oil from Valdez, Alaska, to west coast of the continental United States.
SS <i>Brown</i> , official No. 325111.	.....do	1974	U.S. foreign trade	Worldwide carriage of crude oil.
SS <i>Jones</i> , official No. 190528.	1970, Litton Systems, Mississippi.	1954	U.S. foreign and non-contiguous trade.	Container service between Japan and California via Hawaii.
<i>Hercules</i> , official No. 256,125.	Not available	1968	Domestic	Towing roll-on, roll-off barges from Puget Sound to San Francisco.
XYZ-1, official No. 257,164.	.....do	1968	.....do	Carriage of trailer type containers between Puget Sound and San Francisco.
XYZ-2, official No. 260,138.	.....do	1969	.....do	Do.
OTC-35, official No. 262,170.	.....do	1969	.....do	Do.
200 trailers, Nos. 111032-A-10677B-1M through 11032-A-10877B-1M.	.....do	NA	.....do	For use on Barges XYZ-1, XYZ-2, and OTC-35.
1,500 containers, Nos. 312 A through 1312 A..	.....do	NA	U.S. foreign non-contiguous domestic trade.	For use as complement of SS <i>Jones</i> .

XYZ Co., PROGRAM OBJECTIVES—I. ACQUISITION OR CONSTRUCTION OF VESSELS

Vessel name, and official number	General characteristics	Approximate cost	Amount to be withdrawn from fund	Approximate date of—		Anticipated area of operation
				Contract	Delivery	

XYZ Co., PROGRAM OBJECTIVES—II. RECONSTRUCTION OF VESSELS

Vessel name, and official number	General characteristics	Approximate cost	Amount to be withdrawn from fund	Approximate date of—		Anticipated area of operation
				Contract	Delivery	

XYZ Co., PROGRAM OBJECTIVES—III. PAYMENT OF PRINCIPAL ON EXISTING INDEBTEDNESS

Vessel name and official number	Purpose of indebtedness	Amount to be paid from fund
---------------------------------	-------------------------	-----------------------------

XYZ Co., SCHEDULE C—DEPOSITORY FOR CAPITAL CONSTRUCTION FUND

Name	Address
1. First American Bank checking account	2001 Park Ave., San Francisco, Calif. 94109.
2. Southern California National Bank investment trustee established pursuant to sec. 390.7 of the SOC regulations.	1 Waterfront Place, San Francisco, Calif. 94101.

XYZ Co. SCHEDULE D—MINIMUM DEPOSITS

[In thousands]

Taxable year	Ordinary income	Net proceeds	Fund interest	Depreciation	Total
1973 to 1975	\$3,150	¹ \$2,400	\$250	.....	\$5,800
1976 to 1978	2,900	² 1,500	325	.....	4,725
1979 to 1981	3,000	.....	350	85	3,435

XYZ CO. SCHEDULE D—MINIMUM DEPOSITS—Continued
[In thousands]

Taxable year	Ordinary income	Net proceeds	Fund interest	Depreciation	Total
1982 to 1984	2,800 .....	.....	74	125	3,000
1985 to 1987	2,850 .....	.....	90	60	3,000
1988 to 1990	2,900 .....	.....	100 .....	.....	3,000
1991 to 1993	3,000 .....	.....	100 .....	.....	3,100
1994 to 1996	3,100 .....	.....	110 .....	.....	3,210
1997 to 1999	3,250 .....	.....	120 .....	.....	3,370
2000	3,200 .....	.....	120 .....	.....	3,320
Total .....	.....	.....	.....	.....	35,960

¹ Net proceeds from sale of barges XYZ-1 and XYZ-2 for \$1,200,000 each.

² Net proceeds from sale of tug *Hercules*.

[41 FR 4265, Jan. 29, 1976, as amended at 42 FR 43632, Aug. 30, 1977; 74 FR 17097, Apr. 14, 2009]

EDITORIAL NOTE: At 73 FR 56741, Sept. 30, 2008, appendix II to part 390 was amended; however, the amendment could not be incorporated due to inaccurate amendatory instruction.

APPENDIX III TO PART 390—U.S. DEPARTMENT OF TRANSPORTATION, MARITIME
ADMINISTRATION—SAMPLE SEMIANNUAL REPORT

[Illustrative sample of the report required by the Maritime Administration pursuant to 46 CFR part 390 prescribing the capital construction fund reporting requirements to be followed by those companies which are party to a capital construction fund agreement]

EXHIBIT A—XYZ CO., SUMMARY OF CASH, SECURITIES, AND STOCK ON DEPOSIT AND NET ACCRUED DEPOSITS TO AND ACCRUED WITHDRAWALS FROM THE CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____

	Thousands
Cash (exhibit A-1 and B)	\$1,025
Securities and stock—adjusted basis (exhibit A-2 and B)	2,560
Fund total for tax purposes on deposit (exhibit C)	3,585
Net accrued deposits and withdrawals (exhibit A-3)	450
Fund total (agrees with balance sheet submitted at this date) on deposit for book purposes—June 30, 19____ ..	4,035
Portion of fund total for tax purposes as of June 30, 19____, which represents a “CCF: Security amount” pursuant to an agreement covering the dual use of a capital construction fund	Thousands
Balance brought forward	\$403
Deposits	82
Total “CCF: Security Amount”	485

EXHIBIT A-1—XYZ COMPANY

SUMMARY OF CASH ON DEPOSIT IN CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____

	Thousands
First American Bank, San Francisco, Calif., checking account No. 654-0876-211	\$1,025
Total cash in capital construction fund at June 30, 19____	1,025

EXHIBIT A-2—XYZ CO., SUMMARY OF SECURITIES AND STOCK (ADJUSTED BASIS AND FAIR MARKET VALUE) IN CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19____ (IN THOUSANDS)

	Adjusted basis	Fair market value
Treasury notes—due July 4, 19____, \$800,000 face value, 1st American Bank, San Francisco, Calif., trust account No. 610-2135	\$760	\$760
Negotiable certificate of deposit—due July 31, 19____, \$500,000 at 8 percent, 1st American Bank, San Francisco, Calif., CD No. 186007	500	500
U.S.A. Motors, Inc.—class A common stock, 5,000 shares, Southern California National Bank, trust account No. 358-21	625	725
Energy Co., Inc.—1st preferred, 4,100 shares, Southern California National Bank, trust account No. 358-21	205	255

Maritime Administration, DOT

Pt. 390, App. III

EXHIBIT A-2—XYZ Co., SUMMARY OF SECURITIES AND STOCK (ADJUSTED BASIS AND FAIR MARKET VALUE) IN CAPITAL CONSTRUCTION FUND AS OF JUNE 30, 19__ (IN THOUSANDS)—Continued

	Adjusted basis	Fair market value
Boon Corp.—class A common stock, 10,000 shares, Southern California National Bank, San Francisco, Calif., trust account No. 358-21	470	520
Total securities and stock in capital construction fund at June 30, 19__	2,560	2,760

EXHIBIT A-3—XYZ Co., SUMMARY OF NET ACCRUED DEPOSITS AND WITHDRAWALS IN CAPITAL CONSTRUCTION FUND AS OF JUNE 19__

Thousands

Accrued deposits:	
19__ income (6 mos. ended June 30, 19__	\$500
Depreciation	200
Total	700
Accrued withdrawals: Progress payment made from general fund—hull 210	250
Net accrued deposits and withdrawals in capital construction fund at June 30, 19__	450

EXHIBIT B—XYZ Co., TRANSCRIPT OF TRANSACTIONS IN THE CAPITAL CONSTRUCTION FUND FOR THE 6 MOS. ENDED JUNE 30, 19__

Date	Description of transaction	Cash		Securities and stock (at adjusted basis)		Detail
		Debit	Credit	Debit	Credit	
Jan. 1, 19__	Balances brought forward	\$1,500,000		\$2,000,000		
Jan. 1, 19__	Bond debt payment—SS <i>Smith</i>		\$250,000			
Jan. 3, 19__	Deposit 19__ depreciation	300,000				
Jan. 4, 19__	Purchased Treasury notes—90 days at 6-percent discount..		752,000	752,000		\$800,000 at 6-percent discount.
Feb. 29, 19__	Dividends earned	4,500				\$0.45 per share on 10,000 shares Boon Corp.
Mar. 15, 19__	Progress payment No. 3 hull 210..		172,500			
Apr. 4, 19__	Sale of Treasury notes—cost	752,000			752,000	
	Income from sale	48,000				
Apr. 4, 19__	Purchased Treasury notes 90 days at 5-percent discount.		760,000	760,000		\$800,000 at 5-percent discount.
Apr. 15, 19__	Deposit from 19__ earnings	310,000				
May 15, 19__	Progress payment No. 4—hull 210..		180,000			
June 15, 19__	Sale of stock—cost	200,000			200,000	4,000 shares at \$56.25 per share. Energy Co., Inc.
	Gain on sale of stock	25,000				
	Balances carried forward	1,025,000		2,560,000		

EXHIBIT C—XYZ Co., SUMMARY OF TOTAL TRANSACTION AFFECTING THE TAX ACCOUNT BALANCES IN THE CAPITAL CONSTRUCTION FUND FOR THE 6 MOS. ENDED JUNE 30, 19__

	Ordinary income	Capital gain	Capital	Total
Opening balance, Jan. 1, 19__	\$1,000,000	\$1,000,000	\$1,500,000	\$3,500,000
Deposits, income, transfers in, etc	362,500	25,000	300,000	687,500
Total	1,362,500	1,025,000	1,800,000	4,187,500
Withdrawals, losses, transfers out, etc			602,500	
Balance at June 30, 19__	1,362,500	1,025,000	1,197,500	3,585,000

EXHIBIT D—XYZ COMPANY

SUMMARY BY VESSEL OF QUALIFIED WITHDRAWALS FROM THE FUND FOR THE SIX MONTHS ENDING JUNE 30, 19____

A. Acquisition or Construction of Vessels

- (1) 80,000 dwt tanker: No qualified withdrawals have been made to date; construction is presently scheduled to commence in mid-1977.
- (2) 130-foot ocean tug hull No. 210:
- | | |
|---|-----------|
| Balance brought forward | \$700,000 |
| Qualified withdrawals during period | 352,500 |
| Total qualified withdrawals to date | 1,052,500 |

130-foot ocean tug hull No. 211: No withdrawals have been made to date; construction is presently scheduled to commence in November 1975

B. Acquisition or Construction of Barges, Containers and Trailers

250-foot tank barge: No qualified withdrawals have been made to date; construction presently scheduled to commence in November 1975.

C. Reconstruction of Vessels

None.

D. Reconstruction of Barges, Containers, and Trailers

None.

E. Payment of Principal on Existing Indebtedness

SS *Smith*—Official No. 236425:

Balance brought forward	\$500,000
Qualified withdrawals during period	250,000
Total qualified withdrawals to date	750,000

APPENDIX IV TO PART 390—SAMPLE ADDENDUM TO MARITIME ADMINISTRATION CAPITAL CONSTRUCTION FUND AGREEMENT

This Agreement, made by the Maritime Administrator, Department of Transportation (“Maritime Administrator”) and _____ (“Party”), a citizen of the United States of America, as an Addendum to that certain agreement, Contract No. MA/CCF—

Whereas: 1. On _____, the parties hereto entered into a Capital Construction Fund Agreement (“Agreement”) under 46 U.S.C. 53501 *et seq*;

2. The parties hereto desire to modify that Agreement in the manner hereinafter set forth;

3. The parties hereto have agreed to said amendment and desire to incorporate the same into the Agreement.

Now, therefore, in consideration of the premises the Maritime Administrator and the Party agree as follows:

Notwithstanding the provisions of Article 4(A)(2) of the Agreement, the Party may, within sixty (60) days after notice appears in the FEDERAL REGISTER that the Regulations jointly prescribed by the Secretary of the Treasury and the Secretary of Transportation have been finalized, terminate the Agreement, if such Regulations have a substantial effect on the rights or obligations of the Party. Upon termination of the Agreement pursuant to this Addendum No. _____ the provisions of the Internal Revenue Code of 1986, the Act, and the rules and regulations shall apply to all funds remaining in the Fund as if such funds were withdrawn in a non-qualified, withdrawal, as that term is defined in the Act and the rules and regulations.

In witness whereof, the Secretary and the Party have executed this addendum, in quadruplicate, effective as of the date indicated below.

UNITED STATES OF AMERICA,
Secretary of Transportation,
Maritime Administrator,

Department of Transportation

By By.....
(Contracting Officer)

Date Title.....
Attest: Attest:

By By.....
(Secretary)

..... Title.....
(SEAL) (SEAL)

Approved as to form:

.....
(Assistant Chief Counsel
Maritime Administration)

[G.O. 109, Rev., Amdt. 6, 42 FR 43634, Aug. 30, 1977, as amended at 73 FR 56741, Sept. 30, 2008; 74 FR 17097, Apr. 14, 2009]

EDITORIAL NOTE: At 73 FR 56741, Sept. 30, 2008, appendix IV to part 390 was amended; however, a portion of the amendment could not be incorporated due to inaccurate amendatory instruction.

APPENDIX V TO PART 390—SAMPLE
QUALIFIED TRADE AFFIDAVIT

AFFIDAVIT

State of _____
County of _____
I, _____, (Name) being duly sworn, depose and say:

1. That I am the _____ (Title) of _____.
(Name of party)

2. That I am fully acquainted with and have knowledge of the operations of all qualified agreement vessels owned or operated by my company and identified in Capital Construction Fund Agreement, MA/CCF _____.
_____.

Maritime Administration, DOT

§ 391.0

3. That I have full knowledge of the trading restrictions and liquidated damages provisions pertaining to qualified agreement vessels, as stipulated in 46 U.S.C. 53501 *et seq.*, and in the rules and regulations of 46 CFR Part 390.

4. That based on my inspection of Company records and to the best of my knowledge and belief, except as noted below in statement 5 of this affidavit, during the period _____ (Beginning of taxable year) through _____ (End of taxable year) my company operated its qualified agreement vessels only in the United States, foreign, Great Lakes, and noncontiguous domestic trade in accordance with Capital Construction Fund Agreement, MA/CCF _____.

5. Exceptions to statement 4 of this Affidavit are as follows (indicate exceptions below or attach a supplemental statement if additional space is needed; if there are no exceptions, write "none"):

(Affiant)

Subscribed and sworn to before me, a Notary Public in and for the State, City and County above named, this _____ day of _____, 19____.

(Notary Public)

My _____ commission expires _____, 19____.

[41 FR 39751, Sept. 16, 1976; 74 FR 17097, Apr. 14, 2009]

PART 391—FEDERAL INCOME TAX ASPECTS OF THE CAPITAL CONSTRUCTION FUND

Sec.

391.0 Statutory provisions; section 607, Merchant Marine Act, 1936, as amended.

391.1 Scope of section 607 of the Act and the regulations in this part.

391.2 Ceiling on deposits.

391.3 Nontaxability of deposits.

391.4 Establishment of accounts.

391.5 Qualified withdrawals.

391.6 Tax treatment of qualified withdrawals.

391.7 Tax treatment of nonqualified withdrawals.

391.8 Certain corporate reorganizations and changes in partnerships, and certain transfers on death. [Reserved]

391.9 Consolidated returns. [Reserved]

391.10 Transitional rules for existing funds.

391.11 Definitions.

AUTHORITY: Secs. 204(b) and 607(1), Merchant Marine Act, 1936, as amended (46 U.S.C. 1114, 1177), Reorganization Plans No. 21 of 1950 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840) as amended by Pub. L. 91-469 (84

Stat. 1036), Dept. of Commerce Organization Order 10-8 (38 FR 19707), July 23, 1973.

SOURCE: 41 FR 23960, June 14, 1976, unless otherwise noted.

§ 391.0 Statutory provisions; section 607, Merchant Marine Act, 1936, as amended.

SEC. 607 (a) Agreement Rules.

Any citizen of the United States owning or leasing one or more eligible vessels (as defined in subsection (k)(1)) may enter into an agreement with the Secretary of Transportation under, and as provided in, this section to establish a capital construction fund (hereinafter in this section referred to as the "fund") with respect to any or all of such vessels. Any agreement entered into under this section shall be for the purpose of providing replacement vessels, additional vessels, or reconstructed vessels, built in the United States and documented under the laws of the United States for operation in the United States foreign, Great Lakes, or noncontiguous domestic trade or in the fisheries of the United States and shall provide for the deposit in the fund of the amounts agreed upon as necessary or appropriate to provide for qualified withdrawals under subsection (f). The deposits in the fund, and all withdrawals from the fund, whether qualified or nonqualified, shall be subject to such conditions and requirements as the Secretary of Transportation may by regulations prescribe or are set forth in such agreement; except that the Secretary of Transportation may not require any person to deposit in the fund for any taxable year more than 50 percent of that portion of such person's taxable income for such year (computed in the manner provided in subsection (b)(1)(A)) which is attributable to the operation of the agreement vessels.

(b) Ceiling on Deposits.

(1) The amount deposited under subsection (a) in the fund for any taxable year shall not exceed the sum of:

(A) That portion of the taxable income of the owner or lessee for such year (computed as provided in chapter 1 of the Internal Revenue Code of 1954 but without regard to the carryback of any net operating loss or net capital loss and without regard to this section) which is attributable to the operation of the agreement vessels in the foreign or domestic commerce of the United States or in the fisheries of the United States.

(B) The amount allowable as a deduction under section 167 of the Internal Revenue Code of 1954 for such year with respect to the agreement vessels.

(C) If the transaction is not taken into account for purposes of subparagraph (A), the net proceeds (as defined in joint regulations) from (i) the sale or other disposition of any